

No. 11288

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

MIKE RADICH and C. T. BROWN, doing business  
under the fictitious firm name of Radich & Brown and  
CLARENCE A. DAVIES,

Appellants,

vs.

UNITED STATES OF AMERICA, C. B. STRAT-  
TON, doing business under the name of Stratton Con-  
struction Company, WALTER S. ROEDER, JACK  
WILCOX, GALEN B. FINCH, OTTO DAVIS and  
MELVIN MYERS,

Appellees.

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**TRANSCRIPT OF RECORD**

Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division

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FILED

JUN 21 1946

PAUL P. O'BRIEN,

CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS:

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For Appellee United States of America:

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United States Attorney

RONALD WALKER and

CAMERON L. LILLIE

Assistants U. S. Attorney

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For Appellee Jack Wilcox:

HART & HEFFERNAN

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For Appellee Galen B. Finch:

JAMES V. BREWER

1125 Fidelity Building, Los Angeles 13, Calif.

For Appellees Otto Davis and Melvin Myers:

STEPHEN BEDFORD

Fuller Building, San Bernardino, Calif. [1\*]

In the District Court of the United States  
Southern District of California

Central Division

No. 4427-BH

C. B. STRATTON, doing business under the name of  
STRATTON CONSTRUCTION COMPANY,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

## COMPLAINT

(Contract)

Plaintiff for Cause of Action Against Defendant Alleges:

### I.

That Plaintiff, C. B. Stratton, is a resident of the City of Pasadena, County of Los Angeles, State of California, and is domiciled within the jurisdiction of the above entitled court. That heretofore, and prior to the commencement of the within action, Plaintiff made, published and filed a Certificate under and pursuant to the provisions of Sections 2466 and 2468 of the Civil Code of the State of California, which said Certificate is on file in the Office of the Clerk of the County of Los Angeles, State of California, in which county Plaintiff maintains his principal place of business. [2]

### II.

This action is brought under and pursuant to the provisions of the Statutes of the United States of America



and particularly the Statutes of March 3rd, 1887, Chapter 359, Sections 1 and 2; 24 Stat. 505, as amended (28 U. S. C. A. Sec. 41).

That this court has jurisdiction of this cause inasmuch as this is an action against the Defendant, United States of America, upon an express contract with the Defendant for damages in an amount less than Ten Thousand (\$10,000.00) Dollars.

### III.

At all times herein mentioned Plaintiff was and now is a general contractor duly and regularly licensed as such under the laws of the State of California.

### IV.

That on April 24th, 1944, the Defendant, United States of America, entered into a written contract with the Plaintiff, said contract being designated as W-04-353-Eng.-621; that in and by the terms of said contract Plaintiff agreed, for a valuable consideration, to construct a Maintenance Hangar, Utilities, and Paving, together with appurtenant facilities, Job No. Palm Springs A(7-5), at Palm Springs Army Airfield, Palm Springs, California, for the Defendant in accordance with plans and specifications attached to said contract and referred to therein.

### V.

That the Plaintiff has performed each and every one of the agreements, covenants and promises on his part to be performed as set forth in the aforesaid contract and that heretofore and prior to the commencement of the within action, and on or about August 22, 1944, the Defendant duly accepted the work to be performed under said contract by Plaintiff. [3]

## VI.

That the Defendant has paid to Plaintiff all of the sums due Plaintiff for the aforesaid construction work as provided for in said contract, except the sum of Four Thousand Six Hundred Forty-five Dollars and Twenty-five Cents (\$4,645.25), and that although duly demanded by Plaintiff of Defendant, the said sum of Four Thousand Six Hundred Forty-five Dollars and Twenty-five Cents (\$4,645.25) has not been paid by Defendant and the whole thereof, to-wit, Four Thousand Six Hundred Forty-five Dollars and Twenty-five Cents (\$4,645.25) is now due, owing and unpaid from Defendant to Plaintiff, with interest thereon as allowed by law, from August 22, 1944.

Therefore, Plaintiff prays judgment against Defendant in the sum of Four Thousand Six Hundred Forty-five Dollars and Twenty-five Cents (\$4,645.25), together with interest thereon as allowed by law from August 22, 1944; for costs of this action and for such other and further relief as to the Court may seem proper.

SIMS, WALLBERT & IASIGI

By James H. Sims

Attorneys for Plaintiff [4]

[Verified.]

[Endorsed]: Filed May 4, 1945. [5]



[Title of District Court and Cause.]

ANSWER

Comes Now the defendant, United States of America, and for answer to plaintiff's Complaint, admits, denies and alleges:

I.

Answering Paragraph VI of plaintiff's Complaint, denies that there is due, owing and unpaid to the plaintiff the sum of \$4,645.25 with interest thereon as allowed by law from August 22, 1944, or any other sum.

Wherefore defendant, United States of America, prays that the Complaint be dismissed without costs to the defendant, and for such other relief as the Court may find just and meet in the premises.

CHARLES H. CARR

United States Attorney

RONALD WALKER

Assistant U. S. Attorney

CAMERON L. LILLIE

Assistant U. S. Attorney

Attorneys for Defendant and Cross-Complainant [6]

In the District Court of the United States in and for the  
Southern District of California

Central Division

No. 4427-BH Civil

C. B. STRATTON, doing business under the name of  
STRATTON CONSTRUCTION COMPANY,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

---

UNITED STATES OF AMERICA,

Defendant and Cross-Complainant,

v.

C. B. STRATTON, doing business under the name of  
STRATTON CONSTRUCTION COMPANY;  
MIKE RADISH and C. T. BROWN, doing business  
under the fictitious firm name of RADISH &  
BROWN; JACK WILCOX, WALTER S. ROEDER,  
GALLEN B. FINCH, and CLARENCE A. DAVIES,

Plaintiff and Cross-Defendants.

### COUNTER-CLAIM AND CROSS-CLAIM

Comes Now the above named defendant, United States of America, and by way of offset and counter-claim to plaintiff's complaint for damages and [7] by way of a Second Defense to its Answer filed and served herewith, said defendant and counter-claimant alleges:

#### I.

That this action is brought in the above entitled Court pursuant to the provisions of Title 28, Sec. 41(1), U. S.

C. A., by reason of the fact that the United States of America is named as cross-complainant.

## II.

That at all times herein mentioned Mike Radish and C. T. Brown, a co-partnership operating under the fictitious firm name of Radish & Brown, were, and are, residents of the County of Los Angeles, State of California, doing business and authorized to do business in the County of Los Angeles, State of California, and having its principle office in the City of Burbank, County of Los Angeles, State of California; that at all times herein mentioned C. B. Stratton was, and is, a resident of the City and County of Los Angeles, State of California, doing business under the name of Stratton Construction Company and authorized to do business in the County of Los Angeles, State of California; that at all times herein mentioned Clarence A. Davies was, and is, a resident of the County of Los Angeles, State of California; that at all times herein mentioned Jack Wilcox was, and is, a resident of the County of Los Angeles, State of California; that at all times herein mentioned Gallen B. Finch was, and is, a resident of the County of San Bernardino, State of California; that at all times herein mentioned Walter S. Roeder was, and is, a resident of the County of Riverside, State of California.

## III.

That at all times herein mentioned the United States of America was, and is, the owner of a B-25c Aircraft S/N 41-12504; that at all times herein mentioned the Palm Springs Army Airfield has been, and now, is located in Palm Springs, California, in the Central Division of the Southern District of California. [8]

## IV.

That, on or about April 24, 1944, a contract was entered into between the plaintiff and cross-defendant, C. B. Stratton, doing business under the name of Stratton Construction Company, and the defendant and cross-complainant, United States of America, said contract being the subject of plaintiff and cross-defendant C. B. Stratton's cause of action; that in the performance of said contract, plaintiff and cross-defendant C. B. Stratton, doing business under the name of Stratton Construction Company, entered into a contract with cross-defendant Jack Wilcox for paving and grading work, and further entered into a contract with cross-defendant Walter S. Roeder for the laying of water mains.

## V.

That at all times herein mentioned cross-defendant Mike Radish and cross-defendant C. T. Brown were the owners of a certain Bulldozer tractor; that cross-defendant Clarence A. Davies was at all times herein mentioned the employee and servant of cross-defendant Mike Radish and cross-defendant C. T. Brown, acting within the scope of his employment; that prior to the 2nd day of May, 1944, cross-defendant Mike Radish, cross-defendant C. T. Brown and cross-defendant Gallen B. Finch entered into an agreement to lease said Bulldozer tractor with cross-defendant Clarence A. Davies as operator; that subsequent to the aforesaid lease and prior to the 2nd day of May, 1944, cross-defendant Gallen B. Finch entered into an agreement with cross-defendant Jack Wilcox to lease to said Jack Wilcox the aforesaid Bulldozer tractor with cross-defendant Clarence A. Davies as operator.

VI.

That, on or about the 2nd day of May, 1944, members of the Armed Forces of the defendant, United States of America, parked the aforesaid B-25c Aircraft S/N 41-12504 on the taxi strip of said Palm Springs Army Airfield; that at said time and place, in the performance of the contract entered into by plaintiff and cross-defendant C. B. Stratton, doing business under the name of Stratton Construction Company, defendant and cross-complainant [9] United States of America, and cross-defendant Clarence A. Davies, an employee and servant of cross-defendant Mike Radish, cross-defendant C. T. Brown and cross-defendant Gallen B. Finch, acting within the scope of his employment, so negligently and recklessly operated and drove said Bulldozer tractor under the direction and control of cross-defendant Jack Wilcox and cross-defendant Walter S. Roeder, and their agents, servants and employees, as to cause the same to collide with the B-25c Aircraft S/N 41-12504 owned by defendant and cross-complainant United States of America; that by reason of such collision and as a direct result of the negligence and recklessness of said cross-defendants, the left wing of the B-25c Aircraft S/N 41-12504 was damaged and destroyed; that the reasonable value of the cost of labor and materials necessary to replace said wing was, and is, the sum of \$4,645.25.

Wherefore, defendant and cross-complainant, United States of America, demands:

1. That the Complaint be dismissed without costs to the defendant and cross-complainant, United States of America;



2. That the Court order plaintiff and cross-defendant C. B. Stratton, doing business under the name of Stratton Construction Company, and cross-defendants Mike Radish and C. T. Brown, doing business under the fictitious firm name of Radish & Brown, and Jack Wilcox, Walter S. Roeder, Gallen B. Finch and Clarence A. Davies, to be made parties defendant to respond to the cross-complaint herein;

3. That defendant and cross-complainant, United States of America, have judgment on its cross-complaint against plaintiff and cross-defendant, C. B. Stratton, doing business under the name of Stratton Construction Company, and cross-defendants Mike Radish and C. T. Brown, doing business under [10] the fictitious firm name of Radish & Brown, and Jack Wilcox, Walter S. Roeder, Gallen B. Finch and Clarence A. Davies, for the sum of \$4,645.25 and costs of suit herein; and for such other relief as the Court may find just and meet in the premises.

CHARLES H. CARR

United States Attorney

RONALD WALKER

Assistant U. S. Attorney

CAMERON L. LILLIE

Assistant U. S. Attorney

Attorneys for Defendant and Cross-Complainant

[Affidavit of Service by Mail.]

[Endorsed]: Filed Jul. 24, 1945. [11]

[Title of District Court and Cause.]

ORDER BRINGING IN ADDITIONAL PARTIES  
ON COUNTER-CLAIM AND CROSS-CLAIM

It Appearing to the Court that cross-defendants Mike Radish and C. T. Brown, doing business under the fictitious firm name of Radish & Brown, [12] and Jack Wilcox, Walter S. Roeder, Gallen B. Finch and Clarence A. Davies are necessary parties to said cross-claim; that their presence is required for the granting of complete relief and the determination of such cross-claim; that jurisdiction of them can be obtained and that their joinder will not deprive the Court of jurisdiction:

It Is Ordered that cross-defendants Mike Radish and C. T. Brown, doing business under the fictitious firm name of Radish & Brown, and Jack Wilcox, Walter S. Roeder, Gallen B. Finch and Clarence A. Davies be made defendants to the cross-claim herein and that a summons be served upon them together with a copy of defendant's Answer and Cross-Claim.

Dated: July 24, 1945.

BEN HARRISON

United States District Judge

Approved as to Form as Provided in Rule 7:

-----  
Attorney for Plaintiff and Cross-Defendants.

[Endorsed]: Filed Jul. 24, 1945. [13]

[Title of District Court and Cause.]

ANSWER

Comes Now, C. B. Stratton, doing business under the name of Stratton Construction Company, the Plaintiff and Cross-Defendant herein, and for answer to Defendant and Cross-Complainant's Counter-Claim and Cross-Claim, admits, denies and [14] alleges:

I.

Answering paragraph VI of said Counter-Claim and Cross-Claim, plaintiff and cross-defendant alleges that he has no information or belief sufficient to answer the allegations contained therein and basing his denial upon such lack of information and belief, denies both generally and specifically each and every one of the allegations contained in said paragraph; except he expressly admits that the Aircraft described in said paragraph was parked, at the time and in the manner and at the location, as alleged; and that said Aircraft belonged to the United States of America.

Wherefore, Plaintiff and Cross-Defendant, prays judgment that said Counter-Claim and Cross-Claim be dismissed and that plaintiff and cross-defendant have and recover judgment as prayed for in his Complaint and for his costs and for such other relief which to the Court may seem just and proper in the premises.

SIMS, WALLBERT & IASIGI

By James H. Sims

Attorneys for C. B. Stratton, doing business under the name of Stratton Construction Company, Plaintiff and Cross-Defendant [15]

[Verified.]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Aug. 2, 1945. [16]



[Title of District Court and Cause.]

ANSWER OF JACK WILCOX TO COUNTER-  
CLAIM AND CROSS-CLAIM

Comes now cross-defendant, Jack Wilcox, for himself alone, answering the counter-claim and cross-claim, and denies generally and specifically any and every allegation of defendant's counter-claim and cross-claim which would impute, or tend to impute any liability to this cross-defendant for the damage or loss sustained by cross-complainant, and that this cross-defendant [17] or any of his employees, agents, servants or equipment were in no way involved directly or indirectly in the occurrence alleged in said counter-claim and cross-claim.

Wherefore, cross-defendant, Jack Wilcox, prays judgment that plaintiff take nothing by its counter-claim and cross-claim, for costs of suit incurred herein, and for such other and further relief as the Court may deem just in the premises.

EDWARD PAYSON HART &  
HORACE HEFFERNAN

By Edward Payson Hart

Attorneys for Cross-Defendant, Jack Wilcox [18]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Aug. 2, 1945. [19]

[Title of District Court and Cause.]

ANSWER OF WALTER S. ROEDER, CROSS-  
DEFENDANT, TO COUNTER-CLAIM AND  
CROSS-CLAIM

Comes now Walter S. Roeder, one of the cross-defendants in the above entitled action, for himself only and not for any other party thereto, and answers the Counter-Claim and Cross-Claim of United States of America, Defendant and Cross-Complainant, heretofore filed therein, as follows: [20]

I.

Cross-defendant Walter S. Roeder answers Paragraph VI of said Counter-Claim and Cross-Claim as follows: This answering cross-defendant denies that, at the time or place of the accident mentioned in said Paragraph VI of said Counter-Claim and Cross-Claim or at any other time or place, cross-defendant Clarence A. Davies was acting under the direction or control of cross-defendant Walter S. Roeder or of any agent or servant or employee of cross-defendant Walter S. Roeder. This answering cross-defendant denies that, by reason of or as any result of any negligence or recklessness of this answering cross-defendant Walter S. Roeder or of any agent or servant or employee of cross-defendant Walter S. Roeder, said or any aircraft, was ever damaged, as alleged by cross-complainant or at all, or any damage whatever inflicted upon cross-complainant. This answering cross-defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegation that the reasonable value of the cost of labor and materials necessary to replace said wing was, and is, the sum of \$4,645.25 and, placing his denial upon

that ground, denies that such reasonable value was, or is, the sum of \$4,645.25 or any other sum.

Wherefore, cross-defendant Walter S. Roeder prays that cross-complainant take nothing by this action, for his costs of suit, and for all other proper relief.

WALTER S. ROEDER

Cross-Defendant

W. C. FRASER

Attorney for Walter S. Roeder,  
Cross-Defendant [21]

[Verified.] [22]

Received copy of the within Answer this 22 day of August, 1945. Charles H. Carr, U. S. Atty., Attorney for U. S., Deft. & Cross-Complainant RM.

[Endorsed]: Filed Aug. 22, 1945. [23]

---

[Title of District Court and Cause.]

ANSWER OF GALEN B. FINCH TO COUNTER-CLAIM AND CROSS-CLAIM

Comes now the cross-defendant Galen B. Finch, sued herein as Gallen B. Finch, and for answer to the counter-claim and cross-claim of United States of America denies and alleges as follows: [24]

For a First Defense to Said Counter-Claim and Cross-Claim, This Cross-Defendant Denies and Alleges as Follows:

I.

That the Counter-Claim and Cross-Claim does not state a claim against this answering cross-defendant upon which relief can be granted.

For a Second Defense to Said Counter-Claim and Cross-Claim, This Cross-Defendant Denies and Alleges as Follows:

I.

Cross-defendant alleges he is without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs I, II, III and IV, and on that ground denies each allegation therein, except that he admits as alleged in paragraph II that he is a resident of San Bernardino County; cross-defendant admits cross-defendants Mike Radich and C. T. Brown as co-partners owned a Bulldozer tractor and leased the same to this answering cross-defendant to be fully operated and maintained by them, but denies each and every other allegation in the counter-claim and cross-claim.

For a Third Defense to Said Counter-Claim and Cross-Claim, This Cross-Defendant Denies and Alleges as Follows:

I.

That if, as alleged in the Counter-Claim and Cross-Claim, the said Bulldozer was taken to the Palm Springs Army Airfield and there collided with the counter-claimant's B-25 airplane, it was taken there without the answering cross-defendant's permission and without his knowledge and against his direct orders, and this cross-defendant was in no way responsible for its operation.

JAMES V. BREWER

Attorney for Cross-Defendant Galen B. Finch [25]

[Affidavit of Service by Mail.]

[Endorsed]: Filed Aug. 24, 1945. [26]

[Title of District Court and Cause.]

## ANSWER

of Cross-Defendants Mike Radich and C. T. Brown, Doing Business Under the Fictitious Firm Name of Radich & Brown (Erroneously Sued and Served Herein as Mike Radish and C. T. Brown, Doing Business Under the Fictitious Firm Name of Radish & Brown)

Come now Mike Radich and C. T. Brown, doing business under the fictitious firm name of Radich & Brown (erroneously sued and served herein as Mike Radish and C. T. Brown, doing business under the fictitious firm name of Radish & Brown) and answer to the Counter-Claim and Cross-Claim of the United States of America as follows:

### I.

Answering the allegations contained in Paragraph V, these [27] defendants deny that cross-defendant Clarence A. Davies was at the times mentioned in cross-complainant's counter-claim and cross-claim acting as the employee and servant or employee or servant of these defendants, or either of them, and deny that at said time said cross-defendant was acting within the scope of his employment.

### II.

Answering the allegations contained in Paragraph VI, these cross-defendants deny that at the time referred to therein cross-defendant Clarence A. Davies was acting as an employee and servant or employee or servant of these cross-defendants, and deny that at said time said



cross-defendant was acting within the scope of his employment, and deny that said cross-defendant at all negligently and recklessly or negligently or recklessly operated and drove or operated or drove the bulldozer tractor referred to therein, and deny that as a direct or any result of the negligence and recklessness or of the negligence or recklessness or any negligence or recklessness of these cross-defendants counter-claimant has been or will be damaged in the sum of \$4,645.25, or in any other sum, or at all.

Wherefore, these answering cross-defendants pray that cross-complainant take nothing by its Counter-Claim and Cross-Claim, and that these cross-defendants have and recover their costs herein incurred and expended

GEORGE H. MOORE and  
HUGH B. ROTCHFORD

By Hugh B. Rotchford

Attorneys for Cross-Defendants Mike Radich and C. T.  
Brown, Doing Business Under the Fictitious Firm  
Name and Style of Radich & Brown [28]

[Verified.] [29]

Received copy of the within Answer this 31st day of August, 1945. Sims, Wallbert & Iasigi, Attorneys for plaintiff and cross-deft. C. B. Stratton.

Received copy of the within Answer this 31 day of Aug., 1945. Charles H. Carr, U. S. Atty., Attorneys  
for RM

[Endorsed]: Filed Aug. 31, 1945. [30]

In the District Court of the United States in and for the  
Southern District of California

Central Division

No. 4427-BH-Civil

C. B. STRATTON, doing business under the name of  
STRATTON CONSTRUCTION COMPANY,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

---

UNITED STATES OF AMERICA,

Defendant and Cross-Complainant,

v.

C. B. STRATTON, doing business under the name of  
STRATTON CONSTRUCTION COMPANY;  
MIKE RADISH and C. T. BROWN, doing business  
under the fictitious firm name of RADISH &  
BROWN; JACK WILCOX, WALTER S. ROE-  
DER, GALLEN B. FINCH, CLARENCE A. DAV-  
IES, OTTO DAVIS and MELVIN MYERS,

Plaintiff and Cross-Defendants.

AMENDED COUNTER-CLAIM AND  
CROSS-CLAIM

Comes Now the above-named defendant, United States of America, and by way of offset and counter-claim to plaintiff's complaint for damages and by way of a Second Defense to its Answer filed and served herewith, said defendant and counter-claimant alleges: [31]

## I.

That this action is brought in the above-entitled Court pursuant to the provisions of Title 28, Sec. 41(1), U. S. C. A., by reason of the fact that the United States of America is named as cross-complainant.

## II.

That at all times herein mentioned Mike Radish and C. T. Brown, a co-partnership operating under the fictitious firm name of Radish & Brown, were, and are, residents of the County of Los Angeles, State of California, doing business and authorized to do business in the County of Los Angeles, State of California, and having its principal office in the City of Burbank, County of Los Angeles, State of California; that at all times herein mentioned C. B. Stratton was, and is, a resident of the City and County of Los Angeles, State of California, doing business under the name of Stratton Construction Company, and authorized to do business in the County of Los Angeles, State of California; that at all times herein mentioned Clarence A. Davies was, and is, a resident of the County of Los Angeles, State of California; that at all times herein mentioned Jack Wilcox was, and is, a resident of the County of Los Angeles, State of California; that at all times herein mentioned Gallen B. Finch was, and is, a resident of the County of San Bernardino, State of California; that at all times herein mentioned Walter S. Roeder was, and is, a resident of the County of Riverside, State of California; that at all times herein mentioned Otto Davis was, and is, a resident of the County of San Bernardino, State of California; that at all times herein mentioned Melvin Myers was, and is, a resident of the County of San Bernardino, State of California.



III.

That at all times herein mentioned the United States of America was, and is, the owner of a B-25c, Aircraft S/N 41-12504; that at all times herein mentioned the Palm Springs Army Airfield has been, and now is, located in Palm Springs, California, in the Central Division of the Southern District of California. [32]

IV.

That, on or about April 24, 1944, a contract was entered into between the plaintiff and cross-defendant, C. B. Stratton, doing business under the name of Stratton Construction Company, and the defendant and cross-complainant, United States of America, said contract being the subject of plaintiff and cross-defendant C. B. Stratton's cause of action; that in the performance of said contract, plaintiff and cross-defendant C. B. Stratton, doing business under the name of Stratton Construction Company, entered into a contract with cross-defendant Jack Wilcox for paving and grading work, and further entered into a contract with cross-defendant Walter S. Roeder for the laying of water mains.

V.

That at all times herein mentioned cross-defendant Mike Radish and cross-defendant C. T. Brown were the owners of a certain Bulldozer tractor; that cross-defendant Clarence A. Davies was at all times herein mentioned the employee and servant of cross-defendant Mike Radish and cross-defendant C. T. Brown, acting within the scope of his employment; that prior to the 2nd day of May, 1944, cross-defendant Mike Radish, cross-defendant C. T. Brown and cross-defendant Gallen B. Finch entered into an agreement to lease said Bulldozer tractor with

cross-defendant Clarence A. Davies as operator; that prior to the 2nd day of May, 1944, cross-defendant Gallen B. Finch and cross-defendants Otto Davis and Melvin Myers entered into an agreement to lease to said Otto Davis and Melvin Myers the aforesaid Bulldozer tractor with cross-defendant Clarence A. Davies as operator; that subsequent to the aforesaid leases and prior to the 2nd day of May, 1944, cross-defendants Otto Davis and Melvin Myers entered into an agreement with cross-defendant Jack Wilcox to lease to said Jack Wilcox the aforesaid Bulldozer tractor with cross-defendant Clarence A. Davies as operator. [33]

## VI.

That, on or about the 2nd day of May, 1944, members of the Armed Force of the defendant, United States of America, parked the aforesaid B-25c Aircraft S/N 71-12504 on the taxi strip of said Palm Springs Army Airfield; that at said time and place, in the performance of the contract entered into by defendant and cross-complainant, United States of America, and plaintiff and cross-defendant, C. B. Stratton, doing business under the name of Stratton Construction Company, cross-defendant Clarence A. Davies, an employee and servant of cross-defendant Mike Radish, cross-defendant C. T. Brown, cross-defendant Gallen B. Finch, cross-defendant Otto Davis and cross-defendant Melvin Myers, acting within the scope of his employment, so negligently and recklessly operated and drove said Bulldozer tractor under the direction and control of cross-defendant Jack Wilcox and cross-defendant Walter S. Roeder, and their agents, servants and employees, as to cause the same to collide with the B-25c Aircraft S/N 41-12504 owned by defendant and cross-complainant United States of America; that by reason of

such collision and as a direct result of the negligence and recklessness of said cross-defendants, the left wing of the B-25c Aircraft S/N 41-12504 was damaged and destroyed; that the reasonable value of the cost of labor and materials necessary to replace said wing was, and is, the sum of \$4,645.25.

Wherefore, defendant and cross-complainant, United States of America, demands:

1. That the Complaint be dismissed without costs to the defendant and cross-complainant, United States of America;

2. That the Court order plaintiff and cross-defendant C. B. Stratton, doing business under the name of Stratton Construction Company, and cross-defendants Mike Radish and C. T. Brown, doing business under the fictitious firm name of Radish & Brown, and Jack Wilcox, Walter S. Roeder, Gallen B. Finch, Otto Davis, Melvin Myers and Clarence A. Davies, to be made parties defendant to respond to the cross-complaint herein; [34]

3. That defendant and cross-complainant, United States of America, have judgment on its cross-complaint against plaintiff and cross-defendant, C. B. Stratton, doing business under the name of Stratton Construction Company, and cross-defendants Mike Radish and C. T. Brown, doing business under the fictitious firm name of Radish & Brown, and Jack Wilcox, Walter S. Roeder, Gallen B. Finch, Otto Davis, Melvin Myers and Clarence A. Davies, for the sum of \$4,645.25 and costs of suit

herein; and for such other relief as the Court may find just and meet in the premises.

CHARLES H. CARR

United States Attorney

RONALD WALKER

Assistant U. S. Attorney

CAMERON L. LILLIE

Assistant U. S. Attorney

Attorneys for Defendant and Cross-Complainant

[Endorsed]: Filed Sep. 19, 1945. [35]

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[Title of District Court and Cause.]

ORDER BRINGING IN ADDITIONAL PARTIES  
ON COUNTER-CLAIM AND CROSS-CLAIM.

It Appearing to the Court that Cross-Defendants Otto Davis and Melvin Myers are necessary parties to said Cross-Complaint that their presence is required for the granting of complete relief and the determination of such Cross-Complaint that jurisdiction of them can be obtained and that their joinder [36] will not deprive the Court of jurisdiction,

It Is Ordered that Cross-Defendants Otto Davis and Melvin Myers be made defendants to the Cross-Claim herein and that a summons be served upon them, together with copy of defendant's Answer and Cross-Claim.

Dated: Sept. 17, 1945.

BEN HARRISON

United States District Judge.

[Endorsed]: Filed Sep. 19, 1945. [37]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the defendant and cross-complainant, United States of America, and the cross-defendants Mike Radish and C. T. Brown, doing business under the fictitious firm name of Radish & Brown, through their respective counsel, that the answer of Mike Radish and C. T. Brown, doing [38] business under the fictitious firm name of Radish & Brown, hereto filed may be deemed the answer of the cross-defendant, Clarence A. Davies.

Dated: This 10 day of October, 1945.

CHARLES H. CARR

United States Attorney

RONALD WALKER and

CAMERON L. LILLIE

Assistant U. S. Attorneys

By Cameron L. Lillie

Attorneys for Defendant and Cross-Complainant

HUGH B. ROTCHFORD

GEORGE H. MOORE

Attorneys for Cross-Defendants Mike Radish and  
C. T. Brown, Doing Business Under the  
Fictitious Firm Name of Radish & Brown

[Endorsed]: Filed Oct. 11, 1945. [39]



[Title of District Court and Cause.]

## ANSWER TO COUNTER-CLAIM AND CROSS-CLAIM

Comes now cross-defendant Otto Davis, and for answer to Defendant and Cross-Complainant's Counter-Claim and Cross-Claim, admits, denies and alleges:

### I.

This answering cross-defendant has no information or [40] knowledge sufficient to enable him to reply specifically to the allegations contained in paragraph III of cross-complainant's counter-claim and cross-claim, and therefore basing his answer on information and belief denies generally and specifically, each and every, all and singular, the allegations contained in said paragraph.

### II.

Answering paragraph IV, this answering cross-defendant has no information or knowledge concerning the allegations in said paragraph contained sufficient to enable him to reply specifically thereto, and therefore on information and belief denies generally and specifically, each and every, all and singular, the allegations in said paragraph contained.

### III.

Answering paragraph VI, this cross-defendant denies that on or about May 2, 1944, he either directly or indirectly operated or caused the operation of said Bulldozer tractor on said Palm Springs Airfield or at all, in a negli-

gent and/or reckless manner or at all; and further denies that he operated or caused to be operated or had any control or direction over the operation of said Bulldozer tractor on May 2, 1944, or on the said Palm Springs Army Airfield at any time or at all; and other than as herein specifically denied this answering cross-defendant has no information or knowledge sufficient to enable him to reply to any of the allegations contained in said paragraph VI and therefore on information and belief denies generally and specifically, each and every, all and singular the allegations contained in said paragraph VI other than those allegations herein specifically denied.

Wherefore: This Cross-Defendant prays judgment that plaintiff take nothing by reason of its action herein and that he have judgment for his costs herein incurred and for all other [41] and further relief that may to this honorable court seem meet and proper in the premises.

C. OTTO DAVIS

Answering Cross-Defendant

STEPHEN BEDFORD

Attorney for Answering Defendant

[Verified.] [42]

Received copy of Answer 10/17/45. C. L. Lillie, Astt.  
U. S. Atty.

[Endorsed]: Filed Oct. 17, 1945. [43]

[Title of District Court and Cause.]

STIPULATION TO SUBMIT CAUSE FOR DECISION UPON AGREED STATEMENT OF FACTS

It Is Hereby Agreed by and between the parties hereto through their respective counsel that the above entitled cause may be submitted to the Court for decision on the day set for trial hereof, upon the pleadings and stipulations filed herein and the following agreed statement of facts: [44]

I.

It Is Stipulated on or about the 24th day of April, 1944, defendant and cross-complainant, the United States of America, and the plaintiff and cross-defendant, C. B. Stratton, doing business under the name of Stratton Construction Company, entered into a Contract (No. 04-353-Eng.-621, a copy of which is attached hereto and marked "Exhibit A") for the performance of certain construction work at the Palm Springs Army Air Field, Palm Springs, California. That thereafter the plaintiff and cross-defendant, C. B. Stratton, doing business under the name of Stratton Construction Company, fully performed the terms of said contract and there is due to said plaintiff on said contract, the principal amount sued for in the complaint, it being understood, however, that the defendant and cross-complainant does not admit any liability for interest on said principal amount. It is further understood that this stipulation does not waive any *tortuous* acts, if any, on the part of C. B. Stratton, doing business under the name of Stratton Construction Company, proximately causing the injury to the bomber complained of in the cross-complaint on file herein.



## II.

Subsequent to the 24th day of April, 1944, and prior to the 2nd day of May, 1944, the plaintiff and cross-defendant, C. B. Stratton, doing business under the name of Stratton Construction Company, sub-contracted with cross-defendant, Jack Wilcox, wherein he acted as an independent contractor for the paving and grading work called for in said Contract (No. 04-353-Eng.-621); that subsequent to the 24th day of April, 1944, and prior to the 2nd day of May, 1944, plaintiff and cross-defendant, C. B. Stratton, doing business under the name of Stratton Construction Company, sub-contracted with the cross-defendant, Walter S. Roeder, wherein he acted as an independent contractor for the laying of water mains under said contract (No. 04-353-Eng.-621).

## III.

Prior to the 2nd day of May, 1944, and at all times herein mentioned, the cross-defendant, Mike Radish, and cross-defendant, C. T. Brown, were the owners of a certain bulldozer tractor; and during all times mentioned herein said cross-defendant, Mike Radish and cross-defendant, C. T. Brown, paid to said [45] cross-defendant, Clarence A. Davies, a salary for the operation of said bulldozer and for keeping said bulldozer in good repair and working order.

Prior to the 2nd day of May, 1944, cross-defendant Mike Radish and cross-defendant C. T. Brown entered into an Equipment and Operator Lease Agreement with cross-defendant Gallen B. Finch for the use of said bulldozer tractor, on farm land, with cross-defendant Clarence A. Davies as operator.

That subsequent to the execution of the last mentioned Equipment and Operator Lease and prior to the 2nd

day of May, 1944, cross-defendant Gallen B. Finch and cross-defendant Otto Davis entered into an Equipment and Operator Lease Agreement for the use of aforesaid bulldozer tractor with cross-defendant Clarence A. Davies as operator; cross-defendant Otto Davis was restricted in the use of said equipment for agricultural purposes and was required before removal from one agricultural job to another to obtain the consent of cross-defendant Gallen B. Finch or his designated agent.

Subsequent to the Equipment and Operator Agreement Lease mentioned and, prior to the 2nd day of May, 1944, cross-defendant Otto Davis entered into an Equipment and Operator Lease Agreement with cross-defendant Jack Wilcox for the use of said bulldozer tractor with cross-defendant Clarence A. Davies as operator, said equipment under the Agreement to be used in grading portions of the Palm Springs Army Air Base. No notice or knowledge of change of jobs was given by cross-defendant Otto Davis to cross-defendant Gallen B. Finch or to cross-defendant Gallen B. Finch's designated agent.

That on or about the 2nd day of May, 1944, cross-defendant Jack Wilcox entered into an Equipment and Operator Lease Agreement with the cross-defendant, Walter S. Roeder, for the use of said equipment in leveling a portion of the Palm Springs Army Air Base, with said cross-defendant Clarence A. Davies as operator; that in performance of the work called for in the last mentioned Equipment and Operator Lease Agreement, the cross-defendant Clarence A. Davies in operating the equipment on the 2nd day of May, 1944, at the Palm Springs Army Air Base, [46] operated said equipment causing the said bulldozer tractor to collide with and damage the defendant and cross-complainant United

States of America's B-25c Aircraft S/N 41-12504, that said aircraft was rightfully parked at said time upon the air-strip of the Palm Springs Army Air Base; that by reason of said damage sustained by the defendant and cross-complainant, the United States of America, it was necessary to expend the sum of \$4,645.25 for the repair of said aircraft. The sum of \$4,645.25 is the reasonable value of material supplied and labor performed to repair said aircraft.

It Is Further Stipulated that if Clarence A. Davies, operator of said equipment, at all times herein mentioned, were called upon to testify, he would testify substantially as follows:

"Previous to the incident herein related, I had been doing some leveling to the North of the taxi strip in the area East of the hanger. Mr. Goodine, Superintendent for Wilcox for whom I was working, came over and told me to prepare a level path for the ditch digger to the South of the East-West taxi strip in front of the hanger. Jesse M. Cox, employee for Mr. Walter S. Roeder and Mr. Goodine, laid the planks across the taxi strip, on which I crossed. I had leveled the area East of the B-25 bomber, above described, and had gone around to the West side of the plane to level a strip approximately 200 feet in length immediately West of the plane to the corner of the proposed water line. I had graded the West portion of this strip forward and was in the process of back dragging from the corner of the line to the plane when the accident occurred. I was backing up in an alignment with my stakes. I was observing the pavement in order not to cut into it with the treads of the tractor. I was looking over my left shoulder at the

ground and immediately back of the tractor when I overheard the crash of the top and rear portion of the frame from the tractor with the tip of the left wing of the aforementioned aircraft. I immediately pushed the hand clutch out in order to stop further backing of the machine. I did not see Mr. Cox until after the crash as he was on my right and I was looking over my left shoulder. He told me he was shouting at me and waving his arms at me but I did not see or hear him because my attention was directed to the left side of the machinery and I [47] could not hear him because of the noise of the machinery while in motion. I have seen the plane since the accident and it has a hole in the wing tip approximately 6" wide and 2 or 2½ ft. in length, caused by the pulley on the upper rear portion of the A-Frame of the tractor, which frame and pulley is necessary for the operation of the particular type of bulldozer. The aircraft in question was parked on the taxi strip just off the main taxi strip; the aircraft remained parked in this position throughout the whole of my leveling operations. I knew the aircraft was to my rear, but I apparently misjudged my distance, not realizing the strip on which the plane was parked was as narrow as it actually developed that it was. On the other side of the strip, the wing did not extend beyond the pavement. However, on the West side, as I learned after the accident and too late, the pavement did not extend beyond the wing, but the wing extended far beyond the pavement and, in my backing of the bulldozer, although I was aware of the plane to my rear, I was watching the pavement. I was directing my attention to the ground immediately to the rear of the machinery and was not aware of the imminent contact of the super-structure of the tractor with the extending wing of the bomber."



That if Henry Goodine, Superintendent for cross-defendant Jack Wilcox, at all times herein mentioned, were called upon to testify, he would testify substantially as follows:

"I am Henry F. Goodine, sometimes known as "Hank". I am Superintendent for Jack Wilcox, contractor. Jack Wilcox has a paving and grading contract as sub-contractor from C. B. Stratton, General Contractor. Walter Roeder is sub-contractor under Stratton for the laying of water mains under the contract. Clarence A. Davies is the operator of lease-operated equipment, including tractor and bulldozer, which was leased by Jack Wilcox. I am the General Supervisor for Jack Wilcox, in charge of the operation of this lease-operated equipment. On the morning of May 2, 1944, Walter Roeder contacted me requesting that we level the terrain along the water pipe line site for him. I, in turn, told Mr. Clarence A. Davies, operator of said equipment, that we would do the leveling for Roeder. I assisted Jesse M. Cox in planking the tractor and bulldozer across the paved taxi strip. I was with the equipment at the time it started the leveling at the [48] extreme East end of said water pipe line. I observed the B-25 aircraft referred to on the hardstand taxi strip at the time the process began but I left the scene of operations for other duties before the job was completed and I was not present at the time of the accident and all I know concerning the accident is hearsay."

That if Jesse M. Cox, at all times herein mentioned, were called upon to testify, he would testify substantially as follows:

"I am an employee of Mr. Walter S. Roeder. On the morning of May 2, 1944 I received instructions from Mr.

Roeder to stake the center line for a pipe line ditch which was to be dug on the South side of the taxi strip, South of the aviation hanger, Army Air Field, Palm Springs, California. Between 1000 and 1100 P.W.T. on the morning in question, a man known to me as Hank, a foreman for Mr. Wilcox, came over to where I had laid out the center line and informed me that the bulldozer was ready to level down the right of way along which the line was to be laid. Hank and I laid timbers across the taxi strip, over which the bulldozer travelled and arrived at the place where the leveling operations were to be conducted. I showed Hank the line of stakes and Hank told the operator that was the center line and Hank told him to go right down that line and knock those stakes down and level the surface so that the trenching machine could get through and dig on a level. When Mr. Clarence A. Davies, the operator of the bulldozer, came over with the bulldozer, I discussed with him the best method of leveling the terrain. We decided it would be best to level from East to West because a bomber with the name "Hari-Kari" on its nose section, was parked upon the pavement across which the ditch line ran and there was a low spot on the surface just immediately East of the bomber into which sand had to be pushed in order to make a level. The leveling process initially took place on the East side of parked B-25c aircraft, which was parked on a hardstand taxi strip just South of the East-West taxi strip in front of the hanger. This plane was so parked that the center of its wings



was in the center line of the survey of the ditch we were to dig. When the work of leveling the terrain East of the plane had been completed, Mr. Davies asked me how he would get around to the West side of the airplane to level the terrain on that side. He asked me if it would be necessary for us to plank over [49] the taxi strip immediately back of the bomber. I told him "No" that it would not be necessary as he could go around on the South side of the hardstand and thus circling the hardstand would not come in contact with any pavement. As he started around the hardstand to the West side of the airplane, I left him. When I returned, he had made one pass across the ground from the plane to the corner of the pipe line, approximately 200 feet to the West. He was backing the bulldozer at the time I arrived back on the scene of operations. I noticed that the frame on top of the bulldozer, which is A-Shape, on the rear of the tractor, was about 2 feet from the tip of the wing from the aircraft. I first noticed this situation as I came around from behind a parked plane immediately in front of the entrance to the hanger. I was approximately 50 feet from the bulldozer and its operator at the time I first observed the situation. The operator of the bulldozer, Mr. Davies, was looking down at the pavement along which he was backing his tractor. He also looked over his shoulder but did not look up at the plane or at the wing of the plane which was almost immediately overhead. When I noticed his proximity to the plane, I yelled at him and ran toward him. I made motions with

my arms and yelled at him but he evidently did not see me and was unable to hear me above the noise of the machinery he was operating. I arrived within about 10 or 15 feet of the operator of the bulldozer at the time the upper part of the frame of the bulldozer made contact with the wing of the plane. Mr. Davies then pulled the bulldozer out from the aircraft around to the East side of the hardstand and asked me to plank him across the hardstand in order that he might park the bulldozer to the rear of the hanger. Before Mr. Davies pulled the bulldozer out of the wing section of the plane, I got up on the tractor and Mr. Davies stated to me that he knew the plane was back there, that he was watching the pavement and did not realize he was close to the plane."

CHARLES H. CARR

United States Attorney

CAMERON L. LILLIE

Assistant U. S. Attorney

SIMS, WALLBERT & IASIGI

904 A. G. Bartlett, Building, Los Angeles

JAMES H. SIMS [50]

MOORE AND ROTCHFORD

918 Fidelity Bldg., Los Angeles

JAMES V. BREWER

548 South Spring Street, Los Angeles

W. C. FRASER

739 Fidelity Building, Los Angeles

HART AND HEFFERNAN

724 South Spring St., Los Angeles

STEPHEN BEDFORD

Fuller Bldg., San Bernardino [51]

[EXHIBIT A]

UNITED STATES [Crest] OF AMERICA  
GENERAL ACCOUNTING OFFICE

Pursuant to the provisions of sections 306 and 311 (e) of the Budget and Accounting , 192 42 Stat. 24, 25; 31 U. S. C. 46, 52 (e), and to 4 CFR 2.2. (a), I hereby certify that the annexed documents, numbered X-1 to X-21, inc., are true copies of the official documents now on file in the General Accounting Office in the following case:

C. B. Stratton

In Witness Whereof, I have hereunto set my hand and caused the seal of the General Accounting Office to be affixed this 23 day of July in the year 1945 at Washington.

By direction of the Comptroller General of the United States,

(Seal)

A. H. Martin

Chief Clerk, General Accounting Office. [52]

(1) X-1

[Written]: W 04-353 eng

Contract No. W-04-353-Eng.-621

Negotiated Contract

Hurt

CONSTRUCTION CONTRACT  
WAR DEPARTMENT

General Accounting Office,  
Army Audit Branch,  
R & C Division,  
1206 Santee Street,  
Los Angeles 15, California.

[Written]: [Illegible] 7/29/44

17 Jun 1944

Contractor & Address:

C. B. STRATTON,  
3537 East Colorado Street,  
Pasadena, California.

Contract For:

Maintenance Hangar, Utilities, and Paving,  
Job No. Palm Springs A(7-5).

Amount:

\$62,448.16.

Location:

Palm Springs Army Airfield,  
Palm Springs, California.

Payment:

To be made by                      Finance Officer,  
United States Army, at    824 South Western Avenue,  
Los Angeles, California.

The supplies and services to be obtained by this instrument are authorized by, are for the purposes set forth in, and are chargeable to the following allotments, the available balances of which are sufficient to *the* cover the cost of the same:

212/40905 E.S.A., 1942-44, 8-32154 P210-10

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This contract is authorized by the following laws: First War Powers Act, 1941, Act of 18 December 1941, (Public Law 354—77th Cong.), and Executive Order No. 9001, dated 27 December 1941.

[Stamped] For: General Accounting Office Army Audit Branch R & C Subdivision 1205 Santee Street Los Angeles 15, Calif.

[Stamped]: General Accounting Office    Rec'd Jul 8  
1944 Army Audit Branch Los Angeles [53]

Contract No. W-04-353-Eng.-621

## CONTRACT FOR CONSTRUCTION

This Contract, entered into this 24th ——— day of April ———, 1944, by the United States of America (hereinafter called the Government) represented by the Contracting Officer executing this contract, and C. B. Stratton a corporation organized and existing under the laws of the State of a partnership consisting of an individual trading as Stratton Construction Company of the city of Pasadena in the State of California (hereinafter called the Contractor), witnesseth that the parties hereto do mutually agree as follows:

Article 1. Statement of work.—The contractor shall furnish the materials, and perform the work ~~for~~ (except materials and equipment designated to be furnished by the Government) for constructing Maintenance Hangar, Utilities, and Paving, together with appurtenant facilities, Job No. Palm Springs A(7-5), at Palm Springs Army Airfield, Palm Springs, California, for the consideration of the schedule of payment hereto attached, and in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: Solicitation No. 44-465, dated 29 January 1944, Addendum No. 1, dated 4 February 1944, and drawings as listed therein.

The work shall be commenced on or before 25 April 1944, and shall be completed in accordance with paragraph 1-22 of the specifications. [54]



Contract No. W-04-353-Eng.-621

## SCHEDULE OF PAYMENT

Item No.	Designation	Approx. Quantity	Unit	Unit Price	Amount Dollars Cents
1.	Maintenance hangar	1	Each	\$38,600.00	\$38,600.00
2.	Membrane curing solution, applied	140	Gal.	1.00	140.00
3.	Electrical distribution extension	Job	Lump Sum	.....	1,321.00
4.	6-inch cast-iron pipe water line	1732	Lin. Ft.	2.63	4,555.16
5.	2-inch cast-iron pipe water line	225	Lin. Ft.	1.34	301.50
6.	6-inch gate valve and Type 1 box	1	Each	58.00	58.00
7.	Standard fire hydrant	3	Each	135.00	405.00
8.	Sterilization of water lines	Job	Lump Sum	.....	60.00
9.	6-inch vitrified clay pipe sewer	128	Lin. Ft.	1.75	224.00
10.	Excavating and grading	1500	Cu. Yd.	1.50	2,250.00
11.	2-inch gravel blanket for dust control	20	Cu. Yd.	3.25	65.00
12.	6-inch decomposed granite or gravel base course	1450	Cu. Yd.	3.75	5,437.50
13.	Liquid asphalt, grade MC-1, for prime coat and penetration treatment, applied	13	Ton	28.00	364.00
14.	85-100 penetration paving asphalt	60	Ton	16.00	960.00
15.	Central plant hot bituminous mixture	1000	Ton	7.00	7,000.00
16.	Liquid asphalt, grade RC-2, for seal coat	7	Ton	32.00	224.00
17.	Cover aggregate for seal coat	69	Ton	7.00	483.00
18.	DELETED	Alternate for Item No. 4			
19.	DELETED	Alternate for Item No. 5			

TOTAL

\$62,448.16

(2a) X-3

[55]

## W. D. Contract Form No. 2 (Construction Contract)

Article 2. Specifications and drawings.—The contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the contracting officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures, drawings, or specifications, the matter shall be immediately submitted to the contracting officer, without whose decision said discrepancy shall not be adjusted by the contractor, save only at his own risk and expense. The contracting officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided.

Article 3. Changes.—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: Provided, however, that the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the Secretary of War or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final

settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Article 4. Changed conditions.—Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall with the written approval of the Secretary of War or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.

Article 5. Extras.—Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order.

Article 6. Inspection.—(a) All material and workmanship (if not otherwise designated by the specifications) shall be subject to inspection, examination, and test by Government inspectors at any and all times during manufacture and /or construction and at any and all places where such manufacture and/or [56]

## W. D. Contract Form No. 2 (Construction Contract)

construction are carried on. The Government shall have the right to reject defective material and workmanship or require its correction. Rejected workmanship shall be satisfactorily corrected and rejected material shall be satisfactorily replaced with proper material without charge therefor, and the contractor shall promptly segregate and remove the rejected material from the premises. If the contractor fails to proceed at once with the replacement of rejected material and/or the correction of defective workmanship the Government may, by contract or otherwise, replace such material and/or correct such workmanship and charge the cost thereof to the contractor, or may terminate the right of the contractor to proceed as provided in Article 9 of this contract, the contractor and surety being liable for any damage to the same extent as provided in said Article 9 for terminations thereunder.

(b) The contractor shall furnish promptly without additional charge, all reasonable facilities, labor, and materials necessary for the safe and convenient inspection and test that may be required by the inspectors. All inspection and tests by the Government shall be performed in such manner as not unnecessarily to delay the work. Special, full size, and performance tests shall be as described in the specifications. The contractor shall be charged with any additional cost of inspection when material and workmanship are not ready at the time inspection is requested by the contractor.

(c) Should it be considered necessary or advisable by the Government at any time before final acceptance of the entire work to make an examination of work already completed, by removing or tearing out same, the con-



tractor shall on request promptly furnish all necessary facilities, labor, and material. If such work is found to be defective in any material respect, due to fault of the contractor or his subcontractors, he shall defray all the expenses of such examination and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, the actual cost of labor and material necessarily involved in the examination and replacement, plus 15 percent, shall be allowed the contractor and he shall, in addition, if completion of the work has been delayed thereby, be granted a suitable extension of time on account of the additional work involved.

(d) Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of production, manufacture, or shipment, whenever the quantity justifies it, unless otherwise stated in the specifications; and such inspection and acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, departure from specific requirements of the contract and the specifications and drawings made a part thereof, damage or loss in transit, fraud, or such gross mistakes as amount to fraud. Subject to the requirements contained in the preceding sentence, the inspection of material and workmanship for final acceptance as a whole or in part shall be made at the site.

Article 7. Materials and workmanship.—Unless otherwise specifically provided for in the specifications, all workmanship, equipment, materials, and articles incorporated in the work covered by this contract are to be of the best grade of their respective kinds for the purpose.



Where equipment, materials, or articles are referred to in the specifications as "equal to" any particular standard, the contracting officer shall decide the question of equality. The contractor shall furnish to the contracting officer for his approval the name of the manufacturer of machinery, mechanical and other equip- [57]

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ment which he contemplates incorporating in the work, together with their performance capacities and other pertinent information. When required by the specifications, or when called for by the contracting officer, the contractor shall furnish the contracting officer for approval full information concerning the materials or articles which he contemplates incorporating in the work. Samples of materials shall be submitted for approval when so directed. Machinery, equipment, materials, and articles installed or used without such approval shall be at the risk of subsequent rejection. The contracting officer may require the contractor to remove from the work such employee as the contracting officer deems incompetent, careless, insubordinate, or otherwise objectionable, or whose continued employment on the work is deemed by the contracting officer to be contrary to the public interest.

Article 8. Superintendence by Contractor.—The contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the contracting officer, on the work at all times during progress, with authority to act for him.

Article 9. Delays—Damages.—If the contractor refuse or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay.

In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor; Provided, that the right of the contractor to proceed shall not be terminated under this article because of any delays in the completion of the work due to causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to acts of God, or of the public enemy, acts of the Government (including, but not restricted to any preference, priority or allocation order), acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes. In which event the contracting officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject

only to appeal within 30 days, by the contractor to the Secretary of War or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extention of time for completing the work shall be final and conclusive on the parties hereto.

Article 10. Permits and responsibility for work.—The contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that [58]

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occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for all materials delivered and work performed until completion and final acceptance. Upon completion of the contract the work shall be delivered complete and undamaged.

Article 11. Labor.—(a) Eight-hour law.—No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated shall be required or permitted to work more than 8 hours in any one calendar day upon such work at the site thereof, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this article. The wages of every laborer and mechanic employed by the contractor or any subcontractor engaged in the performance of this contract shall be computed on a basic day rate of 8 hours per day and work in excess of 8 hours per days is per-

mitted only upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of 8 hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this article a penalty of \$5 shall be imposed upon the contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than 8 hours upon said work without receiving compensation computed in accordance with this article, and all penalties thus imposed shall be withheld for the use and benefit of the Government: Provided; That this stipulation shall be subject in all respects to the exceptions and provisions of U. S. Code, title 40, sections 321, 324, 325, and 326, relating to hours of labor, as modified by the provisions of Section 303 of Public Act No. 781, 76th Congress, approved September 9, 1940, relating to compensation for overtime.

(b) Overtime rates and shifts.—Where a single shift is worked, eight hours of continuous employment, except for lunch periods, shall constitute a day's work beginning on Monday and through Friday of each week. When work is required in excess of eight hours in any one day or during the interval from 5:00 p. m. Friday to 7:00 a. m. Monday, such work shall be paid for at 1½ times the basic rate wages. No premium wage or extra compensation shall be paid for work on customary holidays except that time and one-half wage compensation shall be paid for work performed on any of the following days only: New Year's Day, Fourth of July Labor Day, Thanksgiving Day, Christmas Day, and Memorial Day. Where two or more shifts are worked, five consecutive days of 7½ consecutive hour shifts, from Sunday midnight to Friday midnight shall



constitute a regular week's work. The pay for a full shift period shall be a sum equivalent to eight times the basic hourly rate, and for a period less than the full shift shall be the corresponding proportional amount which the time worked bears to the time allocated to the full shift period. Any time worked from Friday midnight to Sunday midnight or in excess of regular shift hours shall be paid for at  $1\frac{1}{2}$  times the basic rate of wages. Wherever found to be practicable, shifts should be rotated.

(c) Convict labor.—The contractor shall not employ any person undergoing sentence of imprisonment at hard labor. This provision shall not be construed to prevent the contractor or any subcontractor hereunder from obtaining any of the supplies, or any component parts or ingredients thereof, to be furnished under this contract or any of the materials or supplies to be used in connection with the performance of this contract, directly or indirectly, from any Federal, State or territorial prison or prison industry, Provided, That such articles, materials or supplies are not produced pursuant to any contract or other arrangement under which prison labor is hired by or employed or used by any private person, firm or corporation. [59]

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Article 12. Covenant Against Contingent Fees.—The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the contract, or, in its discretion, to deduct from the contract price or consideration the amount of



such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business.

Article 13. Other contracts.—The Government may award other contracts for additional work, and the contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

Article 14. Officials Not To Benefit.—No member of or delegate to Congress or resident commissioner shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

Article 15. Disputes.—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact which may arise under this contract, and which are not disposed of by mutual agreement, shall be decided by the contracting officer, who shall reduce his decision to writing and mail a copy thereof to the contractor at his address shown herein. Within 30 days from said mailing the contractor may appeal in writing to the Secretary of War, whose written decision or that of his designated representative or representatives thereon shall be final and conclusive upon the parties hereto. The Secretary of War may, in his discretion, designate an individual,

or individuals, other than the contracting officer, or a board as his authorized representative to determine appeals under this Article. The contractor shall be afforded an opportunity to be heard and offer evidence in support of his appeal. The president of the board, from time to time, may divide the board into divisions of one or more members and assign members thereto. A majority of the members of the board or of a division thereof shall constitute a quorum for the transaction of the business of the board or of a division, respectively, and the decision of a majority of the members of the board or of a division shall be deemed to be the decision of the board or of a division, as the case may be. If a majority of the members of a division are unable to agree on a decision or if within 30 days after a decision by a division, the board or the president thereof directs that the decision of the division be reviewed by the board, the decision will be so reviewed, otherwise the decision of a majority of the members of a division shall become the decision of the board. If a majority of the members of the board is unable to agree upon a decision, the president will promptly submit the appeal to the Under Secretary of War for his decision upon the record. A vacancy in the board or in any division thereof shall not impair the powers, nor affect the duties of the board or division nor of the remaining members of [60]

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the board or division, respectively. Any member of the board, or any examiner designated by the president of the board for that purpose, may hold hearings, examine witnesses, receive evidence and report the evidence to

the board or to the appropriate division, if the case is pending before a division. Pending decision of a dispute hereunder the contractor shall diligently proceed with the performance of this contract. Any sum or sums allowed to the contractor under the provisions of this Article shall be paid by the United States as part of the cost of the articles or work herein contracted for and shall be deemed to be within the contemplation of this contract.

Article 16. Payments to contractor.—(a) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the contracting officer. In preparing estimates the material delivered on the site and preparatory work done may be taken into consideration.

(b) In making such partial payment there shall be retained 10 percent on the estimated amount until final completion and acceptance of all work covered by the contract; provided, however, That the contracting officer, at any time after 50 percent of the work has been completed, if he finds that satisfactory progress is being made, may make any of the remaining partial payments in full; and provided further, That on completion and acceptance of each separate building, vessel, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made in full, including retained percentages thereon, less authorized deductions.

(c) All material and work covered by partial payments made shall thereupon become the sole property of the Government, but this provision shall not be construed

as relieving the contractor from the sole responsibility for all materials and work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of the Government to require the fulfillment of all of the terms of the contract.

(d) Upon completion and acceptance of all work required hereunder, the amount due the contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the contractor from the operation of the release in stated amounts to be set forth therein.

Article 17. Rate of wages.—(In accordance with the act of August 30, 1935, 49 Stat. 1011, as amended by the act of June 15, 1940, 54 Stat. 399 (U. S. Code, title 40, secs. 276a and 276a-1), this article shall apply if the contract is in excess of \$2,000 in amount and is for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work within the geographical limits of the States of the Union, the Territory of Alaska, the Territory of Hawaii, or the District of Columbia.)

(a) The contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates [61]



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not less or more than those stated in the specifications  
(Subject to Executive Order Number 9250 and the General  
Orders and Regulations issued thereunder) regardless  
of any contractual relationship which may be alleged  
to exist between the contractor or subcontractor and such  
laborers and mechanics; and the scale of wages to be  
paid shall be posted by the contractor in a prominent and  
easily accessible place at the site of the work. The contracting  
officer shall have the right to withhold from the contractor  
so much of accrued payments as may be considered necessary  
by the contracting officer to pay to laborers and mechanics  
employed by the contractor or any subcontractor on the work  
the difference between the rates of wages required by the contract  
to be paid laborers and mechanics on the work and the rates of  
wages received by such laborers and mechanics and not refunded  
to the contractor, subcontractors, or their agents.

(b) In the event it is found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid as aforesaid, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.

(c) The regulations of the Secretary of Labor, referred to in article 19 hereof, allow certain "permissible



deductions" from the wages required by this article to be paid.

Article 18. Termination for Convenience of the Government.—(a) The Government may terminate this contract in whole or in part at any time by a notice in writing from the Contracting Officer to the contractor, specifying the date upon which such termination shall become effective and the extent to which the performance of such contract shall be terminated. Termination shall be effective upon the date and to the extent specified in said notice.

(b) Upon receipt of the notice of termination the Contractor shall except insofar as the notice directs otherwise with respect to this contract, or, in the event of partial termination, with respect to the part thereof covered by the notice:

(1) Discontinue all work and the placing of all orders for materials and facilities otherwise required for the performance thereof;

(2) Cancel all existing orders and subcontracts to the extent such orders and subcontracts are chargeable to the performance thereof;

(3) Transfer to the Government, in accordance with the directions of the contracting officer, all materials, supplies, work in process, facilities, equipment, machinery or tools acquired by the contractor in connection with the performance thereof, and all plans, drawings, working drawings, sketches, specifications and information for use in connection therewith. If, and as the contracting officer so directs or authorizes, the contractor shall sell at a price approved by the contracting officer, or retain at a price mutually agreeable, any such materials, sup-

plies, equipment, machinery, tools, or other things, provided, however, that the contractor may retain any such equipment, machinery and tools as of right if he so elects in writing, stating that he will forego reimbursement therefor. The proceeds of any [62]

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such sale, or the agreed price, shall be paid or credited to the Government in such manner as the contracting officer may direct so as to reduce the amount payable by the Government under this Article.

(4) Take such action as may be necessary to secure to the Government the benefits of any rights remaining in the contractor under orders or subcontracts chargeable thereto to the extent that such orders or subcontracts are so chargeable;

(5) Take such action as the contracting officer may prescribe for the protection and preservation of all property in the possession or control of the contractor, title to which is transferable to the Government under the provision of this article.

Should the notice of termination cover only a portion of this contract, the contractor will proceed to completion of such portions as are not terminated.

(c) Upon compliance by the contractor with the above provisions of this Article and subject to deductions or credit for payments previously made, and without duplication of any such payments, the Government shall pay to the contractor such sum as the contracting officer and the contractor may agree by Supplemental Agreement is reasonably necessary to compensate the contractor for

his costs, expenditures, liabilities, commitments and work with respect to this contract, other than the expenditures and costs referred to in paragraph (e) of this Article. The contracting officer shall include in such sum such allowance for profit with respect to the contract as is reasonable under all the circumstances.

(d) If the contracting officer and the contractor, within 90 days from the effective date of the notice of termination referred to in paragraph (a), or within such extended period as may be agreed upon between them, cannot agree upon the sum payable under the provisions of paragraph (c), the Government shall instead compensate the contractor in the following manner, subject to deductions or credit for payments previously made, and without duplication thereof, and upon compliance with the provisions of paragraphs (a) and (b) of this Article:

(1) By reimbursing the Contractor for all actual expenditures and costs certified by the Contracting Officer as having been made or incurred with respect to this contract, including expenditures and costs made or incurred in connection with any portions of the contract which may have been completed prior to termination, as well as expenditures and costs made or incurred after termination in completing those portions of the contract which the Contractor may have been required by the notice of termination to complete.

(2) By reimbursing or providing for the payment or reimbursement of, the Contractor for all expenditures made or costs incurred with the prior written approval of the Contracting Officer in settling or discharging any outstanding contractual obligations or commitments incurred or entered into by the Contractor with respect to this contract; and

(3) By paying the Contractor, as a profit on this contract, insofar as a profit is realized hereunder, an amount to be computed by the Contracting Officer in the following manner:

(A) Estimate the profit which would have been realized on this contract if the contract had been completed and labor and materials costs prevailing at the date of terminations had remained in effect.

(B) Estimate, from a consideration of all relevant factors, the percentage of completion of the contract including any work performed after termination. In estimating the percentage of the completion, the Contracting Officer shall estimate the percentage of the total work required by the contract which the work actually accomplished re- [63]

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presents.

(C) Multiply the profit determined under (A) by the percentage determined under (B). The product is the amount to be paid the contractor as profit.

(e) The government shall pay to the contractor such sum as the contracting officer and the contractor may agree upon for expenditures made and costs incurred with the approval of the contracting officer (a) after the date of termination for the protection of Government property, and (b) for such other expenditures and costs as may be necessary in connection with the settlement of this contract, and in the absence of such agreement as to the amount of such expenditures and costs shall reimburse the contractor for the same.



(f) The obligation of the Government to make any of the payments required by this Article shall be subject to any unsettled claim for labor or material and to any claim which the Government may have against the contractor under or in connection with this contract, and payments under this Article shall be subject to reasonable deductions by the contracting officer on account of defects in materials or workmanship.

(g) The sum of all amounts payable under this Article, plus the sum of all amounts previously paid under this contract, shall not exceed the total contract price, adjusted in the event that this contract contains an article providing for price adjustment, on the basis of the estimate of the contracting officer, to the extent which would have been required by such article if this contract had been completed and labor and materials costs prevailing at the date of termination had remained in effect.

(h) Should the above provisions of this Article not result in payment to the contractor of at least \$100, then that amount shall be paid to the contractor in lieu of any and all payments hereinbefore provided for in this Article.

(i) The Government shall promptly make partial payments to the contractor

(1) On account of the amounts due under paragraphs (c), (d) and (e) of this Article to the extent that, in the judgment of the contracting officer, such payments are clearly within the amounts due under such paragraphs, and

(2) Of such amounts as the contracting officer may direct, an account of proposed settlements of outstanding obligations or commitments, to be made by the contractor



pursuant to paragraph (d) (2) of this Article, if such settlement shall have been approved by the contracting officer and subject to such provisions for escrow or direct payment to the persons entitled to receive such settlement payments as the contracting officer may require.

(j) Any disputes arising out of termination under this Article shall be decided in accordance with the procedure prescribed in Article 15 of this contract.

(k) Upon the making of the payments called for by this Article, all obligations of the Government to make further payments or to carry out other undertakings hereunder shall cease forthwith and forever, except that all rights and obligations of the respective parties under the Articles, if any, of this contract applicable to patent infringements and reproduction rights shall remain in full force and effect.

(1) The Government shall terminate this contract only in accordance with this Article, except as otherwise provided by law or by Article 9. Notwithstanding Article 9 and any defaults of the contractor, the Government shall terminate this contract only in accordance with this Article if such [64]

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termination is simultaneous with or part of or in connection with a general termination of war contracts at, about the time of, or following the cessation of the present hostilities or the end of the present war, unless the contracting officer finds that the defaults of the contractor (1) have been gross or wilful and (2) have caused substantial damage to the Government.

Article 19. Nonrebate of wages.—The contractor shall comply with the regulations of the Secretary of Labor pursuant to the Act of June 13, 1934, 48 Stat. 948 (U. S. Code, title 40, secs. 276b and 276c), and any amendments or modifications thereof, shall cause appropriate provisions to be inserted in subcontracts to insure compliance therewith by all subcontractors subject thereto, and shall be responsible for the submission of affidavits required of subcontractors thereunder, except as the Secretary of Labor may specifically provide for reasonable limitations, variations, tolerances, and exemptions from the requirements thereof.

Article 20. Taxes.—(a) Unless otherwise indicated in this contract (A) the prices herein do not include any of the following taxes in effect at the date of this contract:

(1) Any Federal tax which is directly applicable to the completed supplies or work covered hereby (including component parts, articles, or units of which the contractor is the manufacturer, importer, or producer) and as to which exemption from tax is available, or

(2) Any state or local sales, use or other tax from which the contractor or this transaction of the procurement of these supplies or work is exempt.

and (B) the prices herein include all other applicable Federal, state, and local taxes in effect at the date of this contract. Upon request of the contractor the Government will issue tax exemption certificates or furnish other similar proof of exemption with respect to all taxes excluded from the price.

(b) If after the date of this contract the Federal Government or any state or local government shall impose,

remove or change (including any change by the removal by statute of an exemption available to the contractor for the purposes of this contract) any duty, sales, use or excise tax or any other tax or charge directly applicable to the supplies or work covered hereby or the materials used in the manufacture thereof or directly upon the importation, production, processing, manufacture, construction, sale or use of such supplies, work or materials, which tax or charge must be borne by the contractor because of a specific contractual obligation or by operation or law, or, in case of a decrease or elimination of any such tax, where the contractor is relieved to that extent, and if in case of an increase in such an existing tax or the imposition of such a new tax the contractor has paid [65]

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such tax or charge to the Federal Government or to a state or local government, or any other person, then the prices named herein will be increased or decreased accordingly and any amount due to the contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as a separate item: Provided, however, That the Government reserves the right to issue to the contractor in lieu of such payment a tax exemption certificate or certificates acceptable to the Federal Government or state or local government, as the case may be. The amount of any adjustment pursuant to this paragraph (b) may be determined by a written agreement between the parties hereto. Nothing contained herein shall be construed as requiring the

Government to reimburse the contractor for any Federal, state, or local income taxes, income surtaxes or excess profits taxes, transportation taxes, or taxes on property. For the purposes of any additional procurement of supplies or work called for by any agreement supplemental hereto, the words 'date of this contract' shall be deemed to refer to the date of such supplemental agreement.

(c) In the case of any state or local tax or charge which the contractor contends is chargeable to the Government because of the provisions of this article, or any other provision of this contract, the contractor agrees to refrain from paying any such tax or charge upon the direction of the contracting officer (in which event the Government will save the contractor harmless from penalties and interest incurred through compliance with the direction of the contracting officer not to pay such tax); to take such steps as may be directed by the Government to cause such tax or charge to be paid under protest; to preserve and, if so directed by the contracting officer, to cause to be assigned to the Government any and all rights to the abatement or refund of such tax or charge; if so requested, to permit the Government to prosecute any claim litigation or proceeding for the refund of such tax in the name of the contractor, and to furnish to the Government all reasonable assistance and cooperation requested by the Government in any litigation or proceeding for the recovery of such tax or charge.

Article 21. Additional security.—Should any surety upon any bond furnished in connection with this contract become unacceptable to the Government, or if any such surety shall fail to furnish reports as to his financial condition from time to time as requested by the Govern-



ment, the contractor must promptly furnish such additional security as may be required from time to time to protect the interests of the Government or of persons supplying labor or materials in the prosecution of the work contemplated by the contract.

Article 22. Loading and Unloading Cars.—The contractor shall load promptly all railroad cars furnished for loading upon his order and shall unload from railroad cars promptly upon arrival all shipments consigned to him, and shall provide storage facilities and other facilities necessary for these purposes; and the contractor shall not order [66]

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railway cars for loading unless they can be loaded promptly and shall not cause or permit shipments to be consigned to him unless they can be unloaded from railroad cars promptly upon arrival.

Article 23. Assignment of Rights Hereunder.—(a) Claims for monies due or to become due the contractor from the Government under this contract may be assigned to a bank, trust company or other financing institution, including any Federal lending agency. Any such assignment shall cover all amounts payable under this contract and not already paid, and shall not be made to more than one party, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing.

(b) In the event of any such assignment the assignee shall file four signed copies of a written notice of the



assignment, together with one copy of the instrument of assignment, with each of the following:

- (i) General Accounting Office;
- (ii) the Contracting Officer;
- (iii) the surety or sureties upon the bond or bonds, if any, in connection with this contract;
- (iv) the officer designated in this contract to make payments thereunder.

(c) Any claim under this contract which has been assigned pursuant to the foregoing provisions of this Article may be further assigned and reassigned to a bank, trust company or other financing institution, including any Federal lending agency. In the event of such further assignment or reassignment the assignee shall file one signed copy of a written notice of the further assignment or reassignment together with a true copy of the instrument of further assignment or reassignment with the contractors; and shall file four signed copies of such written notice and one copy of such instrument with each of the parties designated in the preceding paragraph.

(d) No assignee shall divulge any information concerning the contract except to those persons concerned with the transaction.

(e) Payment to an assignee of any claim under this contract shall not be subject to reduction or set-off for any indebtedness of the assignor to the United States arising independently of this contract.

(f) Indication of the assignment of claim and of any further assignment thereof and the name of the assignee will be made on all vouchers or invoices certified by the contractor.

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Article 25. Anti-discrimination.—(a) The Contractor in performing the work required by this contract, shall not discriminate against any employee or applicant for employment because of race, creed, color, or national origin.

(b) The Contractor agrees that the provision of paragraph (a) above will also be inserted in all of its subcontracts. For the purpose of this article, a subcontract is defined as any contract entered into by the contractor with any individual, partnership, association, corporation, estate, or trust, or other business enterprise or other legal entity, for a specific part of the work to be performed in connection with the supplies or services furnished under this contract; provided, however, that a contract for the furnishing of standard or commercial articles or raw material shall not be considered as a subcontract.

Article 26. Notice to the Government of Labor Disputes.—Whenever an actual or potential labor dispute is delaying or threatens to delay the timely performance of this contract, the Contractor will immediately give notice thereof to the Contracting Officer. Such notice shall include all relevant information with respect to such dispute.

Article 27. Accident Prevention.—In order to protect the life and health of employees in the performance of this contract, the contractor will comply with all pertinent for provisions of the "Safety Requirements in Excavation—Building—Construction" approved by the Chief of Engineers, December 16, 1941, as revised May 15,

~~1942~~, 15 March 1943 (a copy of which is on file in the office of the contracting officer) and as may be amended, and will take or cause to be taken such additional measures as the contracting officer may determine to be reasonably necessary for this purpose. The contractor will maintain an accurate record of and will report to the contracting officer in the manner and on the forms prescribed by the contracting officer, all cases of death, occupational disease and traumatic injury arising out of or in the course of employment on work under this contract. The contracting officer will notify the contractor of any noncompliance with the foregoing provisions and the action to be taken. The contractor shall, after receipt of such notice, immediately correct the conditions to which attention has been directed. Such notice, when served on the contractor or his representative at the site of the work, shall be deemed sufficient for the purpose aforesaid. If the contractor fails or refuses to comply promptly, the contracting officer may issue an order stopping all or any part of the work. When satisfactory corrective action is taken, a start order will be issued. [68]

(15) X-16

W. D. Contract Form No. 2. (Construction Contract)  
Contract No. W-04-353-Eng.-621

No part of the time lost due to any such stop order shall be made the subject of claim for extension of time or for excess costs or damages by the contractor.

Article 28. Definitions.—(a) The term “Secretary of War” as used herein shall include the Under Secretary of War, and the term “his duly authorized representative” shall mean any person or board authorized by the Sec-

retary of War to act for him other than the Contracting Officer.

(b) Except for the original signing of this contract, and except as otherwise stated herein, the term "Contracting Officer" as used herein shall include his duly appointed successor or his authorized representative.

Article 29. Alterations.—The following changes were made in this contract before it was signed by the parties hereto:

Article 24, Renegotiation, has been deleted.

In the 4th line of Article 27, Accident Prevention, the word "in" has been deleted and the word for has been substituted in lieu thereof; and in the 5th line the date "May 15, 1942" has been deleted and 15 March 1943 has been substituted in lieu thereof.

Article 30, Liability for Government-owned property, has been added.

Subparagraph (b) under paragraph 1-22, Commencement, Prosecution, and Completion, of the specifications, has been deleted.

On page II-5 of the specifications, lines 29 through 35 have been deleted.

In the second paragraph of paragraph 10-02, Materials To Be Furnished by the Government and Installed by the Contractor, of the specifications, the words "receipt by the contractor of notice to proceed with the work" have been deleted, and the word award has been substituted in lieu thereof.

Payment Bond. The contractor agrees to furnish a payment bond with good and sufficient surety or sureties



acceptable to the Government for the protection of persons furnishing material or labor in connection with the performance of the work under this agreement, on U. S. Standard Form No. 25-A or U. S. Standard Form No. 25-C, in the penal sum of \$31,224.08. [69]

(16) X-17

W. D. Contract Form No. 2. (Construction Contract)

Article 30. Liability for Government-owned property.

—(a) Except as otherwise specifically provided, the contractor shall not be liable for loss or destruction of or damage to property of the Government in the possession or control of the contractor in connection with this contract (hereinafter called “Government property”) (1) caused by any peril while the property is in transit off the contractor’s premises, or (2) caused by any of the following perils while the property is on the contractor’s or subcontractor’s or other premises or by removal therefrom because of any of the following perils;

Fire; lightning; windstorm, cyclone, tornado, hail; explosion; riot, riot attending a strike, civil commotion; vandalism and malicious mischief; aircraft or objects falling therefrom; vehicles running on land or tracks, excluding vehicles owned or operated by the contractor or any agent or employee of the contractor; smoke; sprinkler leakage; earthquake or volcanic eruption; flood, meaning thereby rising of rivers or streams; enemy attack or any action taken by the military, naval or air forces of the United States in resisting enemy attack.

The perils as set forth in (1) and (2) above are hereinafter called “excepted perils”.



(b) The contractor represents that it is not maintaining and agrees that it will not hereafter maintain insurance (including self-insurance funds or reserves) covering loss or destruction of or damage to Government property caused by any excepted peril, and represents that it is not including and agrees that it will not hereafter include in any price to the Government any charge or reserve for such insurance.

(c) Upon the happening of loss or destruction of or damage to Government property caused by an excepted peril, the contractor shall communicate with the contracting officer and with the Loss and Salvage Organization now or hereafter designated by the contracting officer and, with the assistance of that organization employed by the contractor to perform services in accordance with instructions or regulations of the Government (unless the contracting officer directs that no such organization be employed), shall take all reasonable steps to protect the Government property from further damage, separate the damaged and undamaged Government property, put all the Government property in the best possible order, and furnish to the contracting officer a statement of: (1) the lost, destroyed and damaged Government property, (2) the time and origin of the loss, destruction or damage, (3) all known interests in commingled property of which the Government property is a part, and (4) the insurance, if any, covering any part of or interest in such commingled property. If and as directed by the contracting officer, the contractor shall make repairs and renovations of the damaged Government property. The contractor shall be reimbursed the expenditures made by it in performing its obligations under this paragraph (c) (including charges made to the contractor by the Loss

and Salvage Organization, except any of such charges the payment of which the Government has, at its option, assumed direct), as approved by the contracting officer and set forth in a Supplemental Agreement.

(d) With the approval of the contracting officer after loss or destruction of or damage to Government property, and subject to such conditions and limitations as may be imposed by the contracting officer, the contractor may, in order to minimize the loss to the Government or in order to permit resumption of [70]

(16a) X-18

W. D. Contract Form No. 2. (Construction Contract)

business or the like, sell for the account of the Government any item of Government property which has been damaged beyond practicable repair, or which is so commingled or combined with property of others, including the contractor, that separation is impracticable.

(e) Except to the extent of any loss or destruction of or damage to Government property for which the contractor is relieved of liability under the foregoing provisions of this Article, and except for reasonable wear and tear or depreciation, or the utilization of the Government property in accordance with the provisions of this contract, the Government property (other than property permitted to be sold) shall be returned to the Government in as good condition as when received by the contractor in connection with this contract. In aid of its obligation so to return the Government property, the contractor shall maintain a property control, accounting and maintenance system consistent with good business practice.

(f) In the event the contractor is indemnified, reimbursed or compensated for any loss or destruction of or

damage to Government property, caused by an excepted peril, it shall equitably reimburse the Government. The contractor shall do nothing to prejudice the Government's rights to recover against third parties for any such loss, destruction or damage and, upon the request of the contracting officer, shall at the Government's expense, furnish to the Government all reasonable assistance and cooperation (including the prosecution of suit and the execution of instruments of assignment in favor of the Government) in obtaining recovery.

(g) The Government shall at all times have access to the premises wherein any Government property is located. [71]

(16b) X-19

W. D. Contract Form No. 2      (Construction Contract)  
Contract No. W-04-353-Eng.-621

In Witness Whereof, the parties hereto have executed this contract as of the day and year first above written.

THE UNITED STATES OF AMERICA,

By H. W. Thompson

H. W. Thompson,

Lt. Col., Corps of Engineers,

Contracting Officer.

(Official Title)

C. B. STRATTON

(Contractor)

By C. B. Stratton

3537 East Colorado Street,

Pasadena, California.

(Business Address)

Dorothy W. Stratton

Two Witnesses:

Dorothy W. Stratton

3537 E. Colorado St.

Pasadena, Calif.

(Address)

Lucinda Lyseth Fisher

Lucinda Lyseth Fisher

865 Brent Avenue

So. Pasadena, Calif.

(Address)

\* \* \* \* \* [72]

(17) X-20

WAR DEPARTMENT

UNITED STATES ENGINEER OFFICE

751 South Figueroa Street

Los Angeles, California

February 4, 1944.

ADDENDUM NO. 1

Solicitation No. 44-465, dated January 29, 1944, covering "Maintenance Hangar, Utilities, and Paving, Job No. Palm Springs A(7-5), at Palm Springs Army Airfield, Palm Springs, California."

I. The Specifications, Serial No. 44-465, dated January 29, 1944, covering "Maintenance Hangar, Utilities, and Paving, Job No. Palm Springs A(7-5), at Palm Springs Army Airfield, Palm Springs, California," are modified as follows:

(1) Page II-2, subparagraph 2-03 (d), lines 4 to 7, inclusive. Delete the entire lines, and insert the following:

The area within the building shall be leveled to provide concrete floor on compacted natural grade or compacted fill.

Where the floor is on natural grade the top six (6) inches shall be scarified, moistened, and compacted to conform with the applicable requirements for compacted fill as hereinafter specified.

(2) Page II-2, subparagraph 2-03 (d), line 15. Delete "nine (9) inches," and insert six (6) inches.

(3) Page III-10, subparagraph 3-17 (a) (1). Delete the entire subparagraph, and insert the following:

(1) Floors, except in warm-up rooms, shall have steel trowel float integral finish with nonslip surface. Warm-up rooms shall have steel troweled integral finish.

Note: This addendum is in confirmation of telegraphic addendum dated February 4, 1944.

II. This addendum shall be attached to and shall become a part of the offer.

Rufus W. Putnam  
(L)

Rufus W. Putnam,  
Colonel, Corps of Engineers,  
District Engineer.

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4427-BH-Civ. Stratton vs. U. S. A. et al., Exhibit A  
to Stip. fld. 10/18/45.

[Endorsed]: Filed Oct. 18, 1945. [73]



[Title of District Court and Cause.]

## MEMORANDUM POINTS OF AUTHORITIES

The above case is submitted solely on a written Stipulation of Facts. In Paragraph 1 of the Stipulation, it is expressly agreed that C. B. Stratton, doing business as Stratton Construction Company, the plaintiff herein, fully performed the terms of the Government contract described in complaint. That [74] there is due to C. B. Stratton the principal sum sued for in the complaint. A separate stipulation entered into stipulates that no interest will be charged on the principal amount due.

## THE CROSS-COMPLAINT

The defendant, United States of America, cross-complained and brought in new parties to determine the liability of said parties by reason of damages to a bomber owned by the United States of America, caused by the negligence of cross-defendant Clarence A. Davies and to determine whether any other cross-defendants served herein were liable by reason of the damages.

Paragraph 2 of the Stipulation expressly agrees that C. B. Stratton sub-contracted two portions of the work to be performed by him under said contract, attached to the Stipulation of Facts and marked "Exhibit A". The cross-defendant Jack Wilcox acted as an independent contractor for the paving and grading work and cross-defendant Walter S. Roeder acted as an independent contractor for the laying of water mains.

Paragraph 3 of the Stipulation expressly sets out that the bulldozer tractor which was operated by Clarence A. Davies at the time of the collision, was owned by the

cross-defendant Mike Radish and cross-defendant C. T. Brown; that said bulldozer tractor, with cross-defendant Clarence A. Davies as operator, was leased through a series of Lease Agreements up to and including the time of the accident; that at all times mentioned in the Stipulation, Radish & Brown paid the salary of the operator, Clarence A. Davies, for the operation of the bulldozer and to keep it in good repair and working order.

It Is Further Stipulated under the facts that it was necessary for the United States of America to expend the sum of \$4,645.25 for the repair of said aircraft.

The sworn statements of Clarence A. Davies, the operator of the equipment, Henry F. Goodine, Superintendent for Jack Wilcox, and Jesse M. Cox, employee of Walter S. Roeder, appear in the Stipulation of Facts. Three questions are submitted to the Court:

1. Is the cross-defendant Walter S. Roeder liable to the cross-complainant, United States of America, by reason of the fact that the evidence [75] shows Jesse M. Cox, Walter S. Roeder's employee, gave directions to cross-defendant Clarence A. Davies in the performance of the work wherein the bomber was damaged?

2. Is the cross-defendant Jack Wilcox liable to the cross-complainant, United States of America, by reason of the fact that the evidence shows that Henry F. Goodine, Superintendent of Jack Wilcox, assisted and gave directions for the performance of the work wherein the bomber was damaged?

3. Are defendants Radish & Brown liable as general employers of Clarence A. Davies, by reason of the facts that Radish & Brown leased the equipment with operator,

paid the salary of the operator for the operation of the bulldozer and the keeping of the machine in repair and working condition, during the time the work was being performed by Clarence A. Davies for Walter S. Roeder?

In attempting to sustain Point 1 and 2, diligent search has brought to light only one case, Callahan, et al. v. Harn, 98 Cal. App. 568, 277 Pac. 529, and it might be mentioned in that case the evidence disclosed that the defendant to whom the truck and driver were rented to exercised entire control over the driver.

The Courts, however, have decided a liability of ownership of equipment, with operators, on several occasions wherein the determining question was whether or not the operator of the equipment was either a general or special employee.

“When a master hires out, under rental agreement, the services of employee for operation of instrumentality owned by the master, together with use of instrumentality, without relinquishing power to discharge servant, legal presumption is that, though hirer directs servant where to go and what to do in performance of work, the servant as operator of instrumentality remains, in absence of agreement to contrary, servant of general employer, and negligence of servant constitutes that of owner of instrumentality.”

Peters v. United Studios, Inc. et al., 98 Cal. App. 373, 277 Pac. 156 [76]

McComas v. Al. G. Barnes Shows Co. et al., 201 Cal. 610, 215 Cal. 685, 12 P. (2d) 630

Scrimsher, et al. v. Reliance Rock Co., 116 Cal. App. 500, 2 P. (2d) 862

Carlson v. Sunmaid Raisin Growers Ass'n. et al.,  
121 Cal. App. 719, 9 P. (2d) 946

Madsen v. LeClair, 125 Cal. App. 393, 13 P. (2d)  
939

Lowell v. Harris, 24 Cal. App. (2d) 70, 74 P.  
(2d) 551

"In the absence of evidence, direct or otherwise, from which it may be inferred that a truck driver's general employer relinquished his right of control over the driver of the truck while in transit to one to whom the truck and driver were hired, it must be inferred that he retained such control."

Billig v. Southern Pac. Co. et al., 189 Cal. 477, 209  
Pac. 241

In the Stipulation of Facts, the operator, Clarence A. Davies, testified:

"I was looking over my left shoulder at the ground and immediately back of the tractor when I overheard the crash ---. I knew the aircraft was to my rear, but I apparently misjudged my distance, not realizing the strip on which the plane was parked was as narrow as it actually developed that it was."

Jesse M. Cox, employee of cross-defendant Walter S. Roeder, in the Stipulation of Facts states that he had a conversation with Clarence A. Davies, the operator, immediately subsequent to the accident. Mr. Cox testified:

"Mr. Davies stated to me that he knew the plane was back there, that he was watching the pavement and did not realize he was close to the plane."

It is respectfully submitted that no question arises in respect to the negligence of Clarence A. Davies, the operator of the bulldozer tractor.

CHARLES H. CARR

United States Attorney

RONALD WALKER and

CAMERON L. LILLIE,

Assistant U. S. Attorneys

By Cameron L. Lillie

Attorneys for Defendant and Cross-Complainant

[Endorsed]: Filed Oct. 18, 1945. [78]

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[Title of District Court and Cause.]

#### TRIAL MEMORANDUM OF C. B. STRATTON

The evidence on the Complaint in this case consists solely of a written Stipulation signed by the respective parties to the action.

In the Stipulation it is expressly agreed that C. B. Stratton, doing business as Stratton Construction Company, Plaintiff herein, fully performed the terms of the Government Contract described in the Complaint; and that said C. B. Stratton has been paid all the money due to him under the terms of the contract; except the principal amount prayed for in Plaintiff's Complaint.

Therefore, no issues of fact are presented by the evidence to be decided by this Honorable Court.

Defendant, however, raises the issue that the United States Government is not liable to the Plaintiff, C. B. Stratton, for interest on the principal amount, prior to



judgment by this Court. The Plaintiff concedes this point and agrees that it is the law that Plaintiff is not entitled to interest on the principal amount until after judgment by the Court.

Therefore, judgment should be for Plaintiff in the sum of \$4,645.25 and costs.

### THE CROSS-COMPLAINT

Cross-Defendant, C. B. Stratton, doing business as Stratton Construction Company, was sued in the Cross-Complaint on file herein for damages to a bomber owned by the United States of America, caused by the negligence of Cross-Defendant, Davies.

The undisputed evidence shows that C. B. Stratton entered into a contract with the United States of America in which he agreed, for a contract price, to construct certain improvements described in the contract attached to the Stipulation of Facts and marked Exhibit "A".

It is stipulated also that Stratton, sub-contracted a portion of the work to be performed by him under said contract, to Cross-Defendant Roeder and that said Roeder in performing said work, was acting in the capacity of an independent sub-contractor under Stratton. It is also stipulated that said Stratton sub-contracted a portion of the work under said contract, to be performed by him, to Cross-Defendant, Wilcox and that in the performance of said work the said Wilcox operated as an independent sub-contractor.

The Stipulation further shows that Cross-Defendants, [80] Brown and Radish were the owners of the tractor

which caused the damage to the Cross-Complainant's bomber. It is further agreed that Brown and Radish hired the said tractor with an operator, Cross-Defendant Davies, to Cross-Defendant Finch. It then appears that after Finch finished using the tractor and the operator, he leased same to Cross-Defendants Myers and Davis, who in turn leased same to Cross-Defendant Wilcox, who in turn leased same to Cross-Defendant Roeder and that at the time of the accident which injured the bomber, Cross-Defendant Davies was using said tractor in connection with the performance of Cross-Defendant's Roeder's sub-contract.

There is no evidence to the effect that Cross-Defendant Stratton directed, or controlled, or had the right to control Davies in any manner whatsoever in connection with the performance of said Roeder's contract.

Therefore, C. B. Stratton doing business as Stratton Construction Company, has no liability to Cross-Complainant for damages to the bomber.

#### POINT NO. ONE

Davies was not a servant of Stratton.

"A servant is one who is employed to render personal services to his employer, other than in the pursuit of an independent calling, and who in such services remains entirely under the control and direction of the employer, who is called his master."

Section 3000, Labor Code.

Since it is stipulated that Cross-Defendant, Roeder, was an independent sub-contractor, under Stratton, he could not at the same time be Stratton's servant for the reason that our Courts have defined an independent contractor to be one who, in rendering services, exercises an independent employment or occupation, and represents his employer only as to the results of his work, and not [81] as to the means whereby it is to be accomplished.

Green v. Soule, 145 Cal. 96, 99.

In other cases the Court have defined an independent contractor as follows:

"A person who is engaged in performing certain acts or work for another, but who in performing such acts or work, exercises an independent calling—that is, a calling in which no right of control, or direction is reserved to or vested in, or exercisable by the party for whom the acts or work are to be done."

Barton v. Studebaker Corporation of America, 46 Cal. App. 707.

By comparing the definition of a servant with the tested definition of an independent contractor, it is readily seen that their status is inconsistent. It seems obvious that it is only necessary to point out the fact that in the case of a servant, he acts entirely under the control and direction of the employer; whereas with respect to the independent contractor, he operates an independent calling in which no right of control, or direction is reserved to, or vested in, the employer.

POINT NO. TWO

Since Cross-Defendant Roeder has been established by the evidence to be an independent sub-contractor, employed by Stratton, and since Cross-Defendant Davies, at the time of the accident was operating the tractor in connection with the performance of Roeder's sub-contract; and since there is no evidence showing that Stratton directed or attempted to control Davies in the operation of the tractor, it follows that Stratton has no liability to the Cross-Complainant for the damage done to the bomber.

The general rule in the State of California, is that one who contracts to perform certain work, lawful in itself and not inherently injurious to another, is not responsible for the negligence of a sub-contractor engaged in executing the work under [82] an independent contract.

Schmidlin v. Alta Planing Mill Co., 170 Cal. 589.

Therefore, we respectfully submit that judgment should be for Cross-Defendant, C. B. Stratton on the Cross-Complaint, with costs.

SIMS, WALLBERT & IASIGI and  
HUNTER & LILJESTROM

By James H. Sims

Attorneys for Plaintiff and Cross-Defendant,  
C. B. Stratton

[Endorsed]: Filed Oct. 18, 1945. [83]

[Title of District Court and Cause.]

POINTS AND AUTHORITIES OF MIKE RADICH  
AND C. T. BROWN, DOING BUSINESS UN-  
DER THE FICTITIOUS FIRM NAME AND  
STYLE OF RADICH & BROWN

Under the stipulation of facts it appears conclusively that the sole connection of Cross-Defendants Radich & Brown with the accident in question is that they rented the equipment and driver in question to Cross-Defendant Finch on a fully maintained and operated basis for a certain fixed rental. Thereafter Finch treated the equipment and driver as his own to the extent that the driver and [84] equipment were not only rented by him, but were rented by the sub-lessors. The evidence stands without conflict that all of the control was exercised by parties other than Cross-Defendants Radich & Brown and there is no evidence that Radich & Brown gave any instructions to the driver or had any control or direction over him.

Under the statement of facts, we believe the case of Callahan v. Harm, 98 Cal. App. 568, is conclusive. That case in effect held:

“Where the evidence showed that the owner of the truck hired it to defendant company at a monthly rental, and paid the driver’s wages, but gave no instruction to the driver, and had no control or direction over him, and that the driver received his orders from a member of defendant company and at the time of the accident the driver had taken the truck and a trailer belonging to defendant company acting under its directions, the driver was a special



employee of defendant company, and it, and not the owner of the truck, was liable for the negligence of the driver."

Respectfully submitted,

GEORGE H. MOORE and  
HUGH B. ROTCHFORD

By Hugh B. Rotchford

Attorneys for Cross-Defendants Mike Radich and C. T. Brown, Doing Business Under the Fictitious Firm Name and Style of Radich & Brown.

[Endorsed]: Filed Oct. 22, 1945. [85]

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[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES OF CROSS-DEFENDANT WALTER S. ROEDER

Walter S. Roeder, one of the cross-defendants in the above entitled action respectfully submits his Memorandum of Points and Authorities as follows:

THE FACTS [86]

The material facts, insofar as cross-defendant Walter S. Roeder is at all concerned, are as follows:

Walter S. Roeder was a sub-contractor under C. B. Stratton, Roeder having contracted to lay water mains. Jack Wilcox was another sub-contractor under C. B. Stratton, Wilcox having contracted to do paving and grading work. C. B. Stratton had contracted with the United States of America to do certain construction work at Palm Springs Army Air Field.

On the morning of the accident, Roeder inquired of Henry F. Goodine, foreman for Jack Wilcox, as to whether he would have his bulldozer level off a certain strip for Roeder. Wilcox's foreman stated that he would have it done if Roeder set out a line of stakes indicating where he desired the strip leveled. Wilcox, through his superintendent Goodine, sent Clarence A. Davies with the bulldozer involved in the accident to do this work for Roeder. Jesse M. Cox, an employee of Roeder, assisted in laying planks across a strip of pavement that the bulldozer might cross and pointed out the line of stakes to Goodine and directed Davies as to how to get around to the West side of the airplane. Davies, after doing levelling East of the airplane, went around to the West side of the airplane and had made one pass, levelling the ground from the plane to a point approximately 200-feet to the West thereof, then proceeded to back up and, in so doing, backed into the plane. This levelling work performed by Davies on the day of the accident consumed somewhat less than one hour. On a subsequent day, Wilcox sent Davies with the bulldozer and filled in the ditch for Roeder. This latter operation consumed somewhat more than one hour. Wilcox billed Roeder for two hours at \$15.00 an hour, or a total of \$30.00, terming it "For RD8 Bulldozer rental on your Stratton Construction Company's work." Roeder paid to Wilcox the amount of this bill. [87]

At no time did Roeder pay to Davies any of his wages. Roeder had no right to discharge Davies. Roeder had no right to take Davies off the bulldozer and put another man in charge of it or to have another operator drive it. Roeder had no right to direct or control Davies as to the

manner in which he operated the equipment or as to how to operate it. All that Roeder or any of his agents had the right to do was to point out the work to be done. Jesse M. Cox, Roeder's employee did assist in laying planks across a strip of pavement, so that the bulldozer might cross such pavement, but no damage is claimed to the pavement, and this act of Cox was in no way a proximate cause of Davies' backing the equipment into the airplane.

Not only did Roeder have no right to direct or control Davies in the operation of the equipment, neither he nor any of his agents did direct or control him. Davies was placed in sole control of said bulldozer to operate and maintain it, by the owners thereof, Radich & Brown, who paid his wages.

Neither can it be said that Roeder leased the equipment, as a lessee has the right of possession, and this equipment never passed into the possession of Roeder, and he never had any right to the possession of it.

The relation between Roeder and Wilcox was that of independent contractor, Wilcox being an independent subcontractor under Roeder as to this levelling work. The right to control Davies in the operation of the bulldozer never passed to Roeder.

## THE LAW

1. Without the right to control, there can be no relationship of master and servant, or employer and employee.

Servant is defined in section 3000 of the Labor Code of the State of California (Statutes of 1937 page 261) as follows: "A servant is one who is employed to render

personal service to his employer, other than in the pursuit of an independent calling, [88] and who in such service remains entirely under the control and direction of his employer, who is called his master.”

See also,

Moody v. Industrial Accident Commission, 204 Cal. 668, at 670-672, 269 Pac. 542,

Where a trained nurse was held not to be subject to the control of her patient to a sufficient extent to constitute him her employer.

The control which will constitute one the master of another is authoritative and complete control, as distinguished from mere suggestion as to detail or direction as to the result desired to be accomplished.

See:

Western Indemnity Company vs. Pillsbury, 172 Cal. 807, 811; 159 Pac. 721 (involving an independent contractor who furnished teams and drivers and who elected to drive one of his own teams).

Bohanon vs. James McClatchy Publishing Co., 16 Cal. App. 2d 188 at 196, 199; 60 Pac. 2d 510 (involving an independent contractor who made deliveries on a newspaper route).

See:

Larson v. Lewis-Simas Jones Co., 29 Cal. App. 2d 83 at 89; 84 Pac. 2d 296 (wherein it was held that one of a group of fishermen who chartered a boat from the owner was not the employee of the owner).

2. The employer of a servant may turn him over to another in such a manner as to constitute the other the master *pro hac vice*, but, before this result can follow, the full, complete and authoritative control must be turned over to the new master. It is the right to control which is decisive, and the new master must have acquired the complete right to control for the time being.

*Umsted v. Scofield Engineering Const. Co.*, 203 Cal. 224 at 228-230; 263 Pac. 799. [89]

*Moss v. Chronicle Publishing Co.*, 201 Cal. 610 at 613-617; 258 Pac. 88.

*Billig v. Southern Pacific Company*, 189 Cal. 477, at 483; 209 Pac. 241. (Where the Court at page 483 points out that the power of control does not exist in a situation where a special employer has no voice in the selection or retention of the negligent subordinate, and that, therefore, the doctrine of *respondeat superior* does not apply.)

*Carlson v. Sunmaid Raisin Growers Association*, 121 Cal. App. 719 at 726-727; 9 Pac. 2d 946.

3. In cases where the general master of a servant lends him to another for the purpose of operating an instrumentality which is owned by the general master and which requires skill in its operation, the very nature of the transaction negatives the surrender of control by the general master. The servant may be subject to direction as to where and when he shall put the instrumentality to work but in his operation of the instrumentality he remains responsible to the general master and the servant of the general master. None but the general



master can demand that the servant surrender the instrumentality to another operator.

Such cases are:

Stewart v. Cal. Improvement Company, 131 Cal. 125, 63 Pac. 177, 63 Pac. 724 (where a steam-roller was rented with an operator).

McComas v. Al. G. Barnes Shows Company, 215 Cal. 685 at 691-698, 12 Pac. 2d 630 (where an elephant was rented with his trainer).

Scrimsher v. Reliance Rock Co., 116 Cal. App. 500 at 505; 2 Pacific 2d 862 (where a power shovel was rented with its operator).

Valdick v. LeClair, 106 Cal. App. 489 at 495-8; 289 Pac. 673. [90]

Madsen v. Leclair, 125 Cal. App. 393 at 401-2; 13 Pac. 2d 939 (both of which cases involved the same factual situation, where hoisting machinery was rented with an engineer).

Lowell v. Harris, 24 Cal. App. 2d 70 at 76-81; 74 Pac. 2d 551 (where a truck was rented with driver).

The case of Callahan v. Harm, 98 Cal. App. 568, 277 Pac. 529 may seem to indicate an opposite conclusion but is readily distinguishable. In that case, Harm, the owner of a truck rented it with a driver, Lott, to defendant San Joaquin Valley Transportation Company on a monthly basis. Lott received his orders from the Transportation Company and, on the day of the accident, went with the truck And a Trailer Belonging to the Transportation Company to the premises of Edward L. Soule's Company to pick up some structural iron. On arriving

there, Lott detached the trailer from the truck and pushed it by hand, with the assistance of employees of Soule's into the warehouse of Soule'. The trailer got away, due to the negligence of Lott, and injured the plaintiff, an employee of Soule's. The jury returned a verdict in favor of defendant Harm, the general employer, and against the Transportation Company, as special employer of Lott. The Transportation Company appealed, and the judgment was affirmed. The Court pointed out at page 578 of 98 California Appellate that, at the time of the accident, Lott was not driving Harm's truck, but was handling a trailer that belonged to the Transportation Company. In the case before this Honorable Court, the bulldozer being driven by Clarence A. Davies was the property of Radich & Brown.

It is also well to distinguish the case of

Peters v. United Studios, 98 Cal. App. 373, 277  
Pac. 156.

In that case, appellant United Studios owned a tractor and was the general employer of one Daum, the driver thereof. [91] United Studios directed Daum to go to Christie Studios and "do whatever they wanted done". Daum was ordered to drive his tractor in a particular manner through a doorway and across a stage. He did this four or five times under the orders of the director who was making the picture, when the tractor struck the doorway and veered into the plaintiff. The Court below instructed the jury that Daum was the employee of the United Studios. On appeal, this was held to be error, the appellate court deciding that under the circumstances of the case the question should have been left to the jury. The appellate court, however, carefully pointed out on

pages 383-384 that on the facts in the record the jury could have found either way on that question.

In the instant case, it is submitted that there was no right on the part of Roeder to control the driver Davies or do anything other than indicate the line of stakes to be knocked down.

4. As regards this particular levelling work, cross-defendant Jack Wilcox was an independent subcontractor under Walter S. Roeder, and Walter S. Roeder is not responsible for the negligence of any agent of such subcontractor.

The brief employment of the bulldozer on this levelling work did not constitute a lease of the equipment to Roeder. There was no transfer of the possession thereof to Roeder or any of Roeder's agents.

"Hiring is a contract by which one gives to another the temporary possession *and* use of property, other than money, for reward, and the latter agrees to return the same to the former at a future time." Section 1925, Civil Code of California (*italics ours*).

Entremont v. Whitsell, 13 Cal. 2d 290 at 295; 89 Pac. 2d 392 (a case where one who had entered into a hauling [92] contract with the State was found to be subject to the orders of the Railroad Commission and was held not to have rented his trucks to the State).

It is not accurate to say that Roeder rented or leased the Bulldozer from Wilcox or any one else. The possession thereof never passed to Roeder.

Neither can it be said that Jack Wilcox became personally Roeder's servant and employee. Neither did Davies, the man whom Wilcox sent, become Roeder's servant or employee, either general or special.

Wilcox was an independent contractor as to Roeder.

"An independent contractor is one who, in rendering services, represents his employer only as to the results of his work, and not as to the means whereby it is to be accomplished."

*Green v. Soule'* 145 Cal. 96 at 99; 78 Pac. 337.

A contractor is not liable for the negligence of an independent sub-contractor employed by himself, or of such sub-contractor's servants.

*Green v. Soule'*, *supra*, 145 Cal. at 100.

One is not liable for the negligence of the employees of an independent contractor who has contracted to do work for him.

*Chinnis v. Pomona Pump Co.*, 36 Cal. App. 2d 633 at 637-639; 98 Pac. 2d 560.

It is, therefore, respectfully urged that cross-defendant Walter S. Roeder is in no way responsible for the acts of Clarence A. Davies and that judgment should be rendered in favor of cross-defendant Walter S. Roeder.

Respectfully submitted,

W. C. FRASER,

Attorney for Walter S. Roeder.

[Endorsed]: Filed Nov. 19, 1945. [93]

## [U. S. EXHIBIT A]

## STATEMENT

Statement made under oath by Mr. Clarence A. Davis, civilian employee (working for Jack Wilcox, Excavating and Grading Contractor, 3370 East Randolph Street, Huntington Park, California, 'phone Lafayette 4241, under equipment and operator lease from Radish & Brown, Contractors, owners of bulldozer and tractor in question and immediate employers of Davis), concerning accident involving caterpillar tractor and B-25C aircraft, #41-12504, in front of the aviation hangar, Palm Springs Army Air Field, California, at approximately 1145 PWT, 2 May 1944.

Previous to the incident herein related, I had been doing some levelling to the north of the taxi strip in the area east of the hangar. Hank—Mr. Goodine, superintendent for Jack Wilcox for whom I was working—came over and told me to prepare a level path for the ditch-digger to the south of the east-west taxi strip in front of the hangar. Jesse M. Cox, employee for Mr. Walter Roeder, and Mr. Goodine laid the planks across the taxi strip on which I crossed. I had levelled the area east of the B-25 bomber above-described and had gone around to the west side of the plane to level a strip approximately 200 feet in length immediately west of the plane to the corner of the proposed water line. I had graded the west portion of this strip forward and was in the process of back-dragging from the corner of the line to



the plane when the accident occurred. I was backing up in an alignment with my stakes. I was observing the pavement in order not to cut into it with the tread of the tractor. I was looking over my left shoulder at the ground immediately back of the tractor, when I heard overhead the crash of the top and rear portion of the frame on the tractor

C. A. D.

Exhibit E

-1-

C. A. D. [94]

with the tip of the left wing of the aforementioned aircraft. I immediately pushed the hand clutch out in order to stop further backing of the machine. I did not see Mr. Cox until after the crash as he was on my right and I was looking over my left shoulder. He told me he was shouting at me and waving his arms at me, but I did not see or hear him because my attention was directed to the left side of the machinery and I could not hear him because of the noise of the machinery while in motion. I have seen the plane since the accident and it has a hole in the wing tip approximately six inches wide and two or two-and-a-half feet in length, caused by the pulley on the upper rear portion of the A-frame of the tractor, which frame and pulley is necessary for the operation of this particular type of bulldozer. The aircraft in question was parked on the taxi strip just off the main taxi strip; the aircraft remained parked in this position throughout the whole of my levelling operations. I knew the aircraft was to my rear, but I apparently misjudged my distance—not realizing the strip on which the plane was parked was

as narrow as it actually developed that it was. On the other side of the strip, the wing did not extend beyond the pavement. However, on the west side, as I learned after the accident and too late, the pavement did not extend beyond the wing, but the wing extended far beyond the pavement and, in my backing of the bulldozer, although I was aware of the plane to my rear, I was watching the pavement. I was directing my attention to the ground immediately to the rear of the machinery and was not aware of the imminent contact of the superstructure of the tractor with the extending wing of the bomber. As far as I know, Mr. Cox was the only witness to the accident.

Clarence A. Davis

14629 Haynes St., Van Nuys, Calif.

Subscribed and sworn to before me, the undersigned authority, this 3rd day of May, 1944.

Laurel N. Dunn

LAUREL N. DUNN,

Capt., AC, Claims Officer

No. 4427-BH-Civ. Stratton vs. U. S. A. et al. U. S. Exhibit A. Filed Nov. 23, 1945. Edmund L. Smith, Clerk, by MEW, Deputy Clerk. [95]

[U. S. EXHIBIT B]

STATEMENT

Statement of Jesse M. Cox, made under oath, concerning accident involving a B-25C aircraft, #41-12504, and a bulldozer operated by Clarence A. Davis, employee of Jack Wilcox, Contractor, 2 May 1944, at Army Air Field, Palm Springs, California.

I am an employee of Mr. W. S. Roeder, 2759 Eleventh Street, Riverside, California. On the morning of 2 May 1944, I received instructions from Mr. Roeder to stake a center line for a pipeline ditch which was to be dug on the south side of the taxi strip south of the aviation hangar, Army Air Field, Palm Springs, California. Between 1000 and 1100 PWT on the morning in question, a man known to me as Hank, a foreman for Mr. Wilcox, came over to where I had laid out the center line and informed me that the bulldozer was ready to level down the right of way along which the line was to be laid. Hank and I laid timbers across the taxi strip over which the bulldozer travelled and arrived at the place where the levelling operations were to be conducted. I showed

Hank

Hank

~~the operator of the bulldozer~~ the line of stakes and ^

the operator

Hank told [JMC]

told ^ ~~him~~ that was the center line and ^ ~~for~~ him to go right down that line and knock those stakes down and level the surface so that the trenching machine could get through and dig on a level. When Mr. Clarence A. Davis, the operator of the bulldozer, came over with the

bulldozer, I discussed with him the best method of levelling the terrain. We decided it would be best to level from east to west because a bomber, with the name Hari Kari on its nose section, was parked on the pavement across which the ditch line ran and there was a low spot on the surface just immediately east of the bomber into which sand had to be pushed in order to make a level. The levelling process initially took place on the east side of parked B-25C aircraft, which was parked on a hardstand taxi strip just south of the east-west taxi strip in front of the hangar. This plane was so parked that the center of its wings was in the center line of the survey of the ditch we were to dig. When the work of levelling the terrain east of the plane had been completed, Mr. Davis asked me how he would get around to the west side of the airplane to level the terrain on that side. He asked me if it would be necessary for us to plank over the taxi strip immediately back of the bomber. I told him "No"—that that would not be necessary as he could go around on the south side of the hardstand and thus, circling the hardstand, would not come in contact with any pavement. As he started around the hardstand to the west side of the airplane, I left him. When I returned, he had made one pass across the ground from the plane to the corner of the pipeline approximately 200 ft. to the west. He was backing the bulldozer at the time I arrived back on the scene of operations. I noticed that the frame on top of the bulldozer, which is A-shape, on the rear of the tractor, was about 2 feet from the tip of the wing of the air-

craft. I first noticed this situation as I came around from behind a parked plane immediately in front of the entrance to the hangar. I was approximately 50 ft. from the bulldozer and its operator at the time I first

J. M. C.

Exhibit F

-1-

J. M. C. [96]

observed the situation. The operator of the bulldozer, Mr. Davis, was looking down at the pavement along which he was backing his tractor. He also looked over his shoulder, but he did not look up at the plane or at the wing of the plane which was almost immediately overhead. When I noticed his proximity to the plane, I yelled at him and ran toward him. I made motions with my arms and yelled at him, but he evidently did not see me and was unable to hear me above the noise of the machinery he was operating. I had arrived within about 10 or 15 feet of the operator of bulldozer at the time the upper part of the frame of the bulldozer made contact with the wing of the plane. The frame on which the pulley to the cable operating the blade of the bulldozer is attached passed about 2 or 2½ feet straight into the end of the wing. Mr. Davis then pulled the bulldozer out from the aircraft around to the east side of the hardstand and asked me to plank him across the hardstand in order that he might park the bulldozer to the rear of the hangar. This I did. I do not know whether he came back and looked at the damage to the airplane or not; I was not present if he did. The accident occurred about



1145 PWT and, after planking the bulldozer across the taxi strip, I went to lunch with Mr. Roeder. I reported the incident to Mr. Roeder and I believe he reported it to the area engineers. Before Mr. Davis pulled the bulldozer out of the wing section of the airplane, I got up on the tractor and Mr. Davis stated to me that he knew the plane was back there, but that he was watching the pavement and did not realize that he was close to it (the plane). Since that time I have not had any discussion with Mr. Davis concerning the accident.

Jesse M. Cox

Subscribed and sworn to before me, the undersigned authority, this 26th day of September 1944.

Morris A. Lieberman

MORRIS A. LIEBERMAN

2d Lt., Air Corps

Claims Officer

No. 4427-BH-Civ. Stratton vs. U. S. A. et al. U. S. Exhibit B. Filed Nov. 23, 1945. Edmund L. Smith, Clerk, by MEW, Deputy Clerk. [97]

[U. S. EXHIBIT C]

X WITNESSES  
1 SGT LEO G. VELUREVICH  
CPL PAUL J. FRITSCH.)

No. 4427-BH-Civ.  
Stratton  
vs. U.S. et al.  
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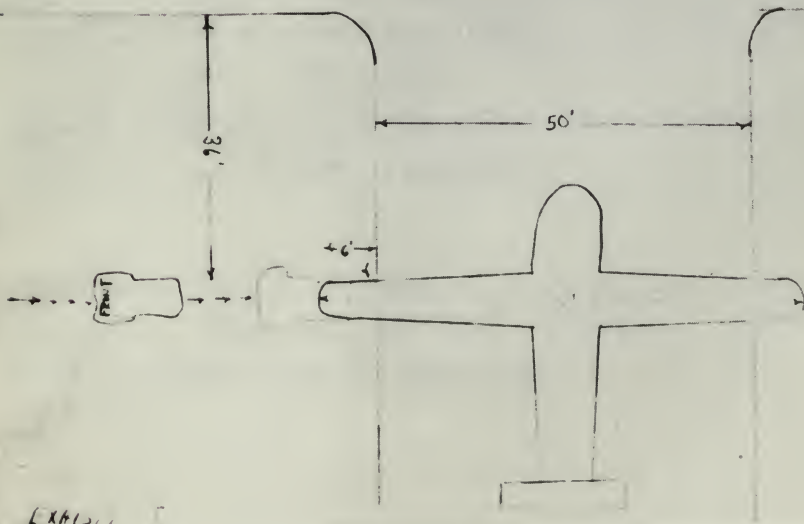


EXHIBIT C



## [FINCH EXHIBIT D]

[Crest]

Phone STanley 7-1361

Invoice  
 RADICH & BROWN  
 Contractors  
 3000 Empire Avenue  
 Burbank, California

Galen B. Finch	Date April 21, 1944
732 - 19th St.	Our Invoice No. 2737
San Bernardino, Calif.	Customer's Order No. Finch
	Job D-8 #64 w/PCU&BD

Location near Palm Village, north of Indio

Description	Unit Price	Amount
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Transportation of:

One (1) D-8 Tractor, Serial No. 1H8929-SP,  
 w/PCU&BD to project near Indio..... \$116.00  
 Radich & Brown truck.

Interest at the rate of 8% per annum will be charged on  
 overdue accounts.

No. 4427-BH-Civ. Stratton vs. U. S. A., et al. Finch  
 Exhibit D. Filed Nov. 23, 1945. Edmund L. Smith,  
 Clerk, by MEW, Deputy Clerk. [99]





## [R. &amp; B. EXHIBIT E]

**EQUIPMENT RENTAL RECORD**

**Order No 3480**

**RADICH & BROWN**  
3000 Empire Avenue, Burbank, Calif.

RENTED TO Galen B. Finch -OWNER- 4/21 for 4/22/45

NAME Galen B. Finch SHIFT NO. 8 mi. to Indio

ADDRESS San Bruno JOB Clear & Land Work LOCATION 17 mi. S. Palm Springs

NO.	EQUIPMENT RENTED	NAME OF OPERATOR	EQUIPMENT HOURS		OPERATING HOURS	FUEL	GALLONS	LBS. OIL
			OPERATING	STANDBY				
1	108 Tractor (W-144 SP)	W/PCU & dog	1	0	1	0.995	1.00	0.00
	Radiation Guard							
Finch will be looking for you as you go to into Palm Springs - I will be under where go Whitewater road & turn right to Palm Springs Finch will direct you to location near Palm Village								
Remarks Clarence Davis car & from 7:00 p.m. to 10:00 p.m.			Signature FOR OWNER FOR CUSTOMER					



## [R. &amp; B. EXHIBIT F]

Crawler Cranes		Building Demolition
Truck Cranes	Invoice	Concrete Breaking
Dump Trucks	JACK WILCOX	Pile Driving
Tractors	Contractor	Excavation
Shovels	Rental or Contract	Grading

Street and Road Improvement Work

Phone LAfayette 4241

3370 East Randolph Street [Crest] Huntington Park,  
California

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Your Order No.	Date	6/24/44
Our Order No.	Terms	
Sold to Walt Roeder		
2759 - 11th St.		
Riverside, Calif.		

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For RD8 Bull Dozer rental on your Stratton  
Construction Company work at the Maintenance Hangar Building at the Army Air Field  
in Palm Springs

2 hrs. @ \$15.00 per hr.	\$30.00
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Please Note: The above rate is the price we were  
invoiced for this equipment

No. 4427-BH-Civ. Stratton vs. U. S. A., et al. R. & B.  
Exhibit F. Filed Nov. 23, 1945. Edmund L. Smith,  
Clerk, by MEW, Deputy Clerk. [102]

[Title of District Court and Cause.]

# MEMORANDUM OPINION

The above matter having heretofore been submitted to this court for determination, the court finds that the plaintiff is entitled to judgment as prayed for and that cross-complainant, United States of America, is entitled to judgment as prayed for against cross-defendants, Mike Radish and C. T. Brown, together with the operator of the instrumentality, Clarence A. Davies. The remaining cross-defendants are entitled to a judgment of dismissal.

I am of the opinion that this case is controlled by the leading case of *Billig v. Southern Pacific Company*, 209 Pac. 241, and other California cases of similar import. It should be noted that [103] Chief Justice Waste who wrote the opinion in *Pruitt v. Industrial Accident Commission etc.*, 209 Pac. 31, relied upon by cross-defendants, Radish and Brown, concurred in the opinion in the *Billig* case.

The cross-defendants, Radish and Brown, were the owners of the bulldozer and Clarence A. Davies at all times was the operator of said equipment and in full control of the operation thereof as the employee of Radish and Brown. The control was similar to that described in *Stewart v. Cal. Imp. Co.*, 131 Cal. 125, 63 Pac. 177. The cross-defendant, Clarence A. Davies, having negligently operated said equipment, his negligence falls also upon his employers, Radish and Brown.

Attorneys for the plaintiff are directed to prepare and submit proposed findings and judgment within ten days.

Dated: This 4 day of December, 1945.

BEN HARRISON

Judge

[Endorsed]: Filed Dec. 4, 1945. [104]

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action came on regularly for trial before the above entitled Court, in Department No. 6 thereof, on the 19th day of November, 1945, before the Honorable Ben Harrison, Judge Presiding, without a jury, a jury trial having been duly waived by the parties hereto; and said cause was thereafter continued to and was on trial on the 23rd and 26th days of [105] November, 1945; the plaintiff and cross-defendant, C. B. Stratton, doing business under the name of Stratton Construction Company, appearing by his attorneys, Sims, Wallbert & Iasigi, Esqs., and Hunter and Liljestrom, Esqs., by James H. Sims, Esq.; the United States of America, defendant and cross-complainant, appearing by its attorneys, Charles H. Carr, United States Attorney, Ronald Walker and Cameron L. Lillie, Assistants United States Attorneys, by Cameron L. Lillie, Esq.; the cross-defendants Mike Radich and C. T. Brown, doing business under the fictitious firm name of Radich and Brown, (sued herein as Mike Radish and C. T. Brown, doing business under the fictitious firm name of Radish and Brown), appearing by their attorneys George H. Moore and Hugh B. Rotchford and John R. A. Girling, Esqs., by John R. A. Girling, Esq.; the cross-defendant Walter S. Roeder, appearing by his attorney W. C. Fraser, Esq.; the cross-defendant Jack Wilcox, appearing by his attorneys Hart & Heffernan, Esqs., by Edward P. Hart, Esq.; the cross-defendant Galen B. Finch, (sued herein as Gallen B. Finch), appearing by his attorney James V. Brewer, Esq.; the cross-defendants, Otto Davis and Melvin Myers,



appearing by their attorney, Stephen Bedford, Esq.; and pursuant to stipulation made herein between the attorneys for defendant and cross-complainant, United States of America and the attorneys for the cross-defendants, Mike Radich and C. T. Brown, doing business under the fictitious firm name of Radich and Brown, that the answer of said cross-defendants to the amended counterclaim and cross-complaint of the cross-complainant, be deemed the answer of cross-defendant Clarence A. Davies, the said cross-defendant Clarence A. Davies thereupon appearing by his attorneys George H. Moore and Hugh B. Rotchford and John R. A. Girling, Esqs., by John R. A. Girling, Esq.:

Whereupon evidence was introduced, both oral and [106] documentary on behalf of the respective parties appearing herein and the evidence being closed and the cause having been argued and submitted to the Court for decision and the Court being fully advised in the premises, now makes its Findings of Fact and Conclusions of Law as follows:

## FINDINGS OF FACT

### I.

That it is true that the plaintiff and cross-defendant, C. B. Stratton, is a resident of the City of Pasadena, County of Los Angeles, State of California, and is domiciled within the jurisdiction of the above entitled Court. That it is further true that prior to the commencement of the above entitled action, plaintiff and cross-defendant, C. B. Stratton, made, published and filed a certificate under and pursuant to the provisions of Sections 2466 and 2468 of the Civil Code of the State of California, which said certificate is on file in the office of the Clerk in the

County of Los Angeles, State of California, in which county said plaintiff and cross-defendant maintains his principal place of business.

## II.

That this action is brought under and pursuant to the provisions of the Statutes of the United States of America and particularly the Statutes of March 3rd, 1887, Chapter 359, Sections 1 and 2; 24 Stat. 505, as amended (Title 28, Sec. 41 (1) U. S. C. A.), by reason of the fact that the United States of America is named as defendant and cross-complainant.

That this court has jurisdiction of this cause inasmuch as this is an action against the defendant, United States of America, upon an express contract for damages in an amount less than Ten Thousand (\$10,000.00) Dollars. [107]

## III.

That it is true that at all times herein mentioned, plaintiff and cross-defendant, C. B. Stratton, was and now is a general contractor, duly and regularly licensed as such under the laws of the State of California.

## IV.

That it is true that on April 24th, 1944, the defendant and cross-complainant, United States of America, entered into a written contract with the plaintiff and cross-defendant, C. B. Stratton, said contract being designated as W-04-353-Eng.-621; that in and by the terms of said contract plaintiff and cross-defendant, C. B. Stratton, agreed, for a valuable consideration, to construct a Maintenance Hangar, Utilities, and Paving, together with appurtenant facilities, Job No. Palm Springs A(7-5), at Palm Springs

Army Airfield, Palm Springs, California, for the defendant and cross-complainant, United States of America, in accordance with plans and specifications attached to said contract and referred to therein.

## V.

That it is true that the plaintiff and cross-defendant, C. B. Stratton, has performed each and every one of the agreements, covenants and promises on his part to be performed as set forth in the aforesaid contract and that it is further true that prior to the commencement of the above entitled action and on or about August 22nd, 1944, the defendant and cross-complainant, United States of America, duly accepted the work to be performed, and so performed, under said contract by plaintiff and cross-defendant, C. B. Stratton.

## VI.

That it is true that the defendant and cross-complainant, United States of America has paid to plaintiff and cross-[108] defendant, C. B. Stratton, all of the sums due said C. B. Stratton for the aforesaid construction work as provided for in said contract, except the sum of Four Thousand Six Hundred Forty-five Dollars and Twenty-five Cents (\$4,645.25); and that although duly demanded by plaintiff and cross-defendant, C. B. Stratton of the defendant and cross-defendant, United States of America, the said sum of Four Thousand Six Hundred Forty-five Dollars and Twenty-five Cents (\$4,645.25) has not been paid by defendant and cross-complainant, United States of America, and the whole thereof, to-wit; the sum of Four Thousand Six Hundred Forty-five Dollars and Twenty-five Cents (\$4,645.25), is now due, owing and unpaid from defendant and cross-complainant, United

States of America, to the plaintiff and cross-defendant, C. B. Stratton.

That it is not true that any interest on the aforesaid sum is due or owing to the plaintiff and cross-defendant, C. B. Stratton, from the defendant and cross-complainant, United States of America.

## VII.

That it is true that at all times mentioned in the pleadings on file herein, the cross-defendants, Mike Radich and C. T. Brown, a co-partnership operating under the fictitious firm name of Radich and Brown, were, and are, residents of the County of Los Angeles, State of California, doing business, and authorized to do business in the County of Los Angeles, State of California, and having their principal office in the City of Burbank, County of Los Angeles, State of California; that it is further true that at all times mentioned in the pleadings herein, the cross-defendant, Clarence A. Davies was, and is, a resident of the County of Los Angeles, State of California; and that it is further true that at all times mentioned in the pleadings on file herein, the cross-defendant, Jack Wilcox, was, and is a resident of the [109] County of Los Angeles, State of California; that it is further true that at all times mentioned in the pleadings on file herein, cross-defendant Galen B. Finch was, and is a resident of the County of San Bernardino, State of California; that it is further true that at all times mentioned in the pleadings on file herein, cross-defendant, Walter S. Roeder was, and is a resident of the County of Riverside, State of California; that it is further true that at all times mentioned in the pleadings on file herein, cross-defendant, Otto Davis was, and is a resident of the



County of San Bernardino, State of California; and that it is further true that at all times mentioned in the pleadings on file herein, Melvin Myers was, and is a resident of the County of San Bernardino, State of California.

#### VIII.

That it is true that at all times mentioned in the pleadings on file herein, the defendant and cross-complainant, United States of America was, and is, the owner of a B-25c Aircraft S/N 41-12504; that it is further true that at all times mentioned in the pleadings on file herein, the Palm Springs Army Airfield has been and now is located in Palm Springs, California, in the Central Division of the Southern District of California.

#### IX.

That it is true that in the performance of the contract dated April 24th, 1944, and hereinabove described, between the plaintiff and cross-defendant, C. B. Stratton, and the defendant and cross-complainant, United States of America, the said plaintiff and cross-defendant, C. B. Stratton, doing business under the name of Stratton Construction Company, entered into a contract with cross-defendant Jack Wilcox for paving and grading work, and further entered into a contract with cross-defendant, Walter S. Roeder, for the laying of water mains. [110]

#### X.

That it is true that at all times mentioned in the pleadings on file herein, cross-defendant, Mike Radich and cross-defendant, C. T. Brown, doing business under the fictitious firm name of Radich and Brown, were the owners of a certain Bulldozer Tractor; and it is further true that cross-defendant, Clarence A. Davies, was at all times mentioned in the pleadings on file herein, the employee and



servant of cross-defendants Mike Radich and C. T. Brown, acting within the scope of his employment; that prior to the 2nd day of May, 1944, cross-defendants Mike Radich and C. T. Brown, and cross-defendant Galen B. Finch, entered into an agreement to lease said Bulldozer Tractor, with cross-defendant, Clarence A. Davies, as operator; that it is further true that prior to the 2nd day of May, 1944, cross-defendant, Galen B. Finch and cross-defendants Otto Davis and Melvin Myers, entered into an agreement to lease to said Otto Davis and Melvin Myers the aforesaid Bulldozer Tractor, with Clarence A. Davies as operator. It is further true that subsequent to the aforesaid leases and prior to the 2nd day of May, 1944, cross-defendants Otto Davis and Melvin Myers, entered into an agreement with cross-defendant Jack Wilcox to lease to said Jack Wilcox the aforesaid Bulldozer Tractor with cross-defendant Clarence A. Davies as operator.

## XI.

That it is true that on or about the 2nd day of May, 1944, members of the Armed Forces of the defendant and cross-complainant, United States of America, parked the aforesaid B-25c Aircraft S/N 41-12504 on the taxi strip of said Palm Springs Army Airfield; that it is further true that at said time and place, cross-defendant Clarence A. Davies, an employee and servant of cross-defendants Mike Radich and C. T. Brown, acting within the scope of his employment and subject only to the control of said cross-defendants [111] Mike Radich and C. T. Brown, who at all times mentioned herein retained the right to exercise control of, and over said cross-defendant, Clarence A. Davies, so negligently and recklessly operated and drove the aforesaid Bulldozer Tractor, as to

cause the same to collide with the B-25c Aircraft S/N 41-12504, owned by defendant and cross-complainant, United States of America. That it is further true that by reason of such collision and as a direct result of the negligence and recklessness of the cross-defendant Clarence A. Davies, cross-defendants Mike Radich and C. T. Brown, the left wing of the B-25c Aircraft S/N 41-12504 was damaged and destroyed; that it is further true that the reasonable value of the cost of labor and materials necessary to replace said wing was, and is, the sum of Four Thousand Six Hundred Forty-five Dollars and Twenty-five Cents (\$4,645.25).

## XII.

That it is not true that at the time and place aforesaid the cross-defendant, Clarence A. Davies, was the employee or servant of plaintiff and cross-defendant, C. B. Stratton, or of the cross-defendant, Otto Davis, or of the cross-defendant, Melvin Myers; that it is further true that at said time and place aforesaid, said cross-defendant, Clarence A. Davies was the special employee of the cross-defendant Jack Wilcox and the cross-defendant Walter S. Roeder, and at said time and place was acting within the scope of his special employment with said cross-defendants, Jack Wilcox and Walter S. Roeder; that it is further true that at no time mentioned in the pleadings on file herein, did the plaintiff and cross-defendant, C. B. Stratton, or the cross-defendants Galen B. Finch, Otto Davis, Melvin Myers, Jack Wilcox or Walter S. Roeder, or any or either of them, exercise any right to control, nor did any one, or either of them, have or [112] retain the right to exercise any control over the cross-defendant Clarence A. Davies in the operation and driving of the aforesaid Bulldozer Tractor.

## CONCLUSIONS OF LAW

And as conclusions of law from the foregoing facts, the Court finds:

## I.

That at all times mentioned in the pleadings on file herein cross-defendants Mike Radich and C. T. Brown were the general employers of cross-defendant Clarence A. Davies who, at all of such times, was acting in the scope of his said employment. That at all of said times, cross-defendants Mike Radich and C. T. Brown exercised the right to control, and retained, and had the right to exercise control over, the said cross-defendant Clarence A. Davies, as operator of the aforesaid Bulldozer Tractor. That by reason thereof, cross-defendants Mike Radich and C. T. Brown are liable for the negligence of the cross-defendant Clarence A. Davies.

## II.

That at no time mentioned in the pleadings on file herein did the plaintiff and cross-defendant, C. B. Stratton, or the cross-defendants Galen B. Finch, Otto Davis, Melvin Myers, Jack Wilcox or Walter S. Roeder, or any or either of them, exercise any right to control, nor did any one, or either of them, have or retain the right to exercise any control over the cross-defendant Clarence A. Davies in the operation and driving of the aforesaid Bulldozer Tractor. That by reason thereof, plaintiff and cross-defendant, C. B. Stratton, and the cross-defendants, Galen B. Finch, Otto Davis, Melvin Myers, Jack Wilcox and Walter S. Roeder, are not liable, nor is any one of them liable, for the negligence of the cross-defendant Clarence A. Davies. [113]

III.

That plaintiff and cross-defendant, C. B. Stratton, is entitled to judgment herein against the defendant and cross-complainant United States of America, in the sum of Four Thousand Six Hundred Forty-five Dollars and Twenty-five Cents, (\$4,645.25), ~~together with his costs.~~

IV.

That defendant and cross-complaint, United States of America is entitled to judgment herein against the cross-defendants Mike Radich and C. T. Brown and Clarence A. Davies, and each of them, in the sum of Four Thousand Six Hundred Forty-five Dollars and Twenty-five Cents (\$4,645.26), together with its costs.

V.

That the defendant and cross-complainant, United States of America is not entitled to any judgment herein against the cross-defendants, C. B. Stratton, Jack Wilcox, Walter S. Roeder, Galen B. Finch, Otto Davis and Melvin Myers.

VI.

That the cross-defendants C. B. Stratton, Jack Wilcox, Walter S. Roeder, Galen B. Finch, Otto Davis and Melvin Myers, and each of them, are entitled to a judgment of dismissal of the cross-complaint of the United States of America, as to them, ~~together with their costs against the defendant and cross-complainant, United States of America.~~

Let Judgment Be Entered Accordingly.

Done in Open Court this 21 day of December, 1945.

BEN HARRISON

Judge

[Endorsed]: Filed Dec. 21, 1945. [114]

In the District Court of the United States in and for the  
Southern District of California

Central Division

No. 4427-BH Civil

C. B. STRATTON, doing business under the name of  
STRATTON CONSTRUCTION COMPANY,  
Plaintiff,

vs.

UNITED STATES OF AMERICA,  
Defendant.

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UNITED STATES OF AMERICA,  
Defendant and Cross-Complainant,

vs.

C. B. STRATTON, doing business under the name of  
STRATTON CONSTRUCTION COMPANY, MIKE  
RADISH and C. T. BROWN, doing business under  
the fictitious firm name of RADISH AND BROWN,  
JACK WILCOX, WALTER S. ROEDER, GALLEN  
B. FINCH, CLARENCE A. DAVIES, OTTO  
DAVIS and MELVIN MYERS,  
Plaintiff and Cross-Defendants.

### JUDGMENT

The above entitled action came on regularly for trial  
before the above entitled Court, in Department No. 6  
thereof, on the 19th day of November, 1945, before the  
Honorable Ben Harrison, Judge Presiding, without a  
jury, a jury trial having been duly waived by the parties



hereto; and said cause was there- [115] after continued to and was on trial on the 23rd and 26th days of November, 1945; the plaintiff and cross-defendant, C. B. Stratton, doing business under the name of Stratton Construction Company, appearing by his attorneys, Sims, Wallbert & Iasigi, Esqs., and Hunter and Liljestrom, Esqs., by James H. Sims, Esq.; the United States of America, defendant and cross-complainant, appearing by its attorneys, Charles H. Carr, United States Attorney, Ronald Walker and Cameron L. Lillie, Assistants United States Attorneys, by Cameron L. Lillie, Esq.; the cross-defendants Mike Radich and C. T. Brown, doing business under the fictitious firm name of Radich and Brown, (sued herein as Mike Radish and C. T. Brown, doing business under the fictitious firm name of Radish and Brown), appearing by their attorneys George H. Moore and Hugh B. Rotchford and John R. A. Girling, Esqs., by John R. A. Girling, Esq.; the cross-defendant Walter S. Roeder, appearing by his attorney W. C. Fraser, Esq.; the cross-defendant Jack Wilcox, appearing by his attorneys Hart & Heffernan, Esqs., by Edward P. Hart, Esq.; the cross-defendant Galen B. Finch, (sued herein as Galen B. Finch), appearing by his attorney James V. Brewer, Esq.; the cross-defendants, Otto Davis and Melvin Myers, appearing by their attorney, Stephen Bedford, Esq.; and pursuant to stipulation made herein between the attorneys for defendant and cross-complainant, United States of America and the attorneys for the cross-defendants, Mike Radich and C. T. Brown, doing busi-

ness under the fictitious firm name of Radich and Brown, that the answer of said cross-defendants to the amended counter-claim and cross-complaint of the cross-complainant, be deemed the answer of cross-defendant Clarence A. Davies, the said cross-defendant Clarence A. Davies thereupon appearing by his attorneys George H. Moore and Hugh B. Rotchford and John R. A. Girling, Esqs., by John R. A. Girling, Esq.: [116]

Whereupon evidence was introduced, both oral and documentary on behalf of the respective parties appearing herein and the evidence being closed and the cause having been argued and submitted to the Court for decision and the Court being fully advised in the premises, and having made and caused to be filed herein its written Findings of Fact and Conclusions of Law and being fully advised in the premises:

Now Therefore, by reason of the law and the Findings of Fact aforesaid, it is hereby Ordered, Adjudged, and Decreed, that the plaintiff and cross-defendant, C. B. Stratton, doing business under the name of Stratton Construction Company, have and recover of and from the defendant and cross-complainant, United States of America, the sum of Four Thousand Six Hundred Forty-five Dollars and Twenty-five Cents (\$4,645.25), ~~together with its costs and disbursements, amounting to the sum of \$.....~~

It Is Further, Ordered, Adjudged and Decreed, that the defendant and cross-complainant, United States of America, have and recover of and from the cross-defend-

ants, Mike Radich and C. T. Brown, doing business under the fictitious firm name of Radich and Brown, and of and from the cross-defendant, Clarence A. Davies, and each of them, the sum of Four Thousand Six Hundred Forty-five Dollars and Twenty-five Cents (\$4,645.25), together with its costs and disbursements in the amount of \$60.27.

It Is Further Ordered, Adjudged and Decreed, that the Cross-Complaint of the defendant and cross-complainant United States of America, be, and the same is hereby, dismissed as to the cross-defendants, C. B. Stratton, Jack Wilcox, Walter S. Roeder, Galen B. Finch, Otto Davis and Melvin Myers, and each of them.

It Is Further Ordered, Adjudged and Decreed that the cross-defendant, Jack Wilcox have and recover from the cross-complainant, United States of America, his costs and disbursements herein in the amount of \$..... [BH] [117]

It Is Further Ordered, Adjudged and Decreed, that the cross-defendant, Walter S. Roeder, have and recover from the cross-complainant United States of America, his costs and disbursements herein in the amount of \$.....

It Is Further Ordered, Adjudged and Decreed, that the cross-defendant, Galen B. Finch, have and recover from the cross-complainant United States of America, his costs and disbursements herein in the amount of \$.....

It Is Further Ordered, Adjudged and Decreed, that the cross-defendant, Otto Davis, have and recover from the cross-complainant United States of America, his

costs and disbursements herein in the amount of  
\$.....

It Is Further Ordered, Adjudged and Decreed, that  
the cross-defendant, ~~Melvin Myers~~, have and recover  
from the cross-complainant United States of America,  
his costs and disbursements herein in the amount of  
\$..... [BH]

The Clerk is hereby Ordered to enter this judgment.

Done in Open Court this 21 day of December, 1945.

BEN HARRISON

Judge.

Judgment entered Dec. 21, 1945. Docketed Dec. 21,  
1945. Book C. O. 36, page 253. Edmund L. Smith,  
Clerk, by Murray E. Wire, Deputy. [118]

Received copy of the within Judgment this 14th day of  
December, 1945. Charles H. Carr, U. S. Atty., & Cam-  
eron L. Lillie, Asst. U. S. Atty., by Cameron L. Lillie, At-  
torneys for Defendant, Cross-Complainant United States  
of America.

[Endorsed]: Filed Dec. 21, 1945. [119]

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[Title of District Court and Cause.]

STIPULATION RE SUPERSEDEAS AND  
COST BOND

It is hereby stipulated by and between Cross-Complain-  
ant United States of America and Cross-Defendants Mike  
Radich and C. T. Brown, doing business under the fic-  
titious firm name of Radich & Brown and Clarence A.

Davies, that the court make an order fixing the Supersedeas and Cost Bond on appeal to be filed by said cross-defendants in relation to an appeal to be taken in the above-entitled action by said cross-defendants in the sum of [120] Five Thousand Dollars ((\$5,000.00).

Dated: January 25, 1946.

GEORGE H. MOORE and  
HUGH B. ROTCHFORD

By Hugh B. Rotchford JW  
Attorneys for Appellants and Cross-Defendants

CHARLES H. CARR  
RONALD WALKER and  
CAMERON L. LILLIE

By Cameron L. Lillie  
United States Attorneys

ORDER FIXING SUPERSEDEAS AND  
COST BOND

In accordance with the foregoing stipulation it is hereby Ordered that the amount of the Supersedeas and Cost Bond on appeal to be filed by the appellants and cross-defendants herein in relation to an appeal to be taken by them in the above-entitled action be and hereby is fixed at the sum of Five Thousand Dollars (\$5,000.00).

Dated: January 25, 1946.

BEN HARRISON

Judge

[Endorsed]: Filed Jan. 25, 1946. [121]



[Title of District Court and Cause.]

NOTICE OF APPEAL

To the United States of America and to Charles H. Carr,  
*Roland Walker and Cameron L. Lillie, its attorneys.*

To C. B. Stratton, doing business under the name of  
Stratton Construction Company and Sims, Wallbert  
& Iasigi and Hunter & Liljestrom, his attorneys.

To Walter S. Roeder and W. C. Fraser, his attorney. [122]

To Jack Wilcox and Hart & Heffernan, his attorneys.

To Galen B. Finch and James V. Brewer.

To Otto Davis and Melvin Myers and Stephen Bedford,  
their attorney.

Notice Is Hereby Given that Mike Radich and C. T. Brown, doing business under the fictitious firm name of Radich & Brown, and Clarence A. Davies, cross-defendants herein, do hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in the within action on or about the 21st day of December, 1945, and from the whole thereof.

Dated: January 25, 1946.

GEORGE H. MOORE and  
HUGH B. ROTCHFORD

By Hugh B. Rotchford

Attorneys for Cross-Defendants Mike Radich and C. T. Brown, doing business under the fictitious firm name of Radich & Brown and Clarence A. Davies.

1-30-46 Mailed copies to counsel designated above.  
Edmund L. Smith, Clerk, by Theodore Hocke, Chief  
Deputy Clerk.

[Endorsed]: Filed Jan. 26, 1946. [123]

[Title of District Court and Cause.]

GREAT-AMERICAN INDEMNITY COMPANY  
New York

Bond No. 237071

Premium \$100.00

COSTS AND SUPERSEDEAS BOND

Know All Men By These Presents, that we, Mike Radich and C. T. Brown, doing business under the fictitious firm name of Radich & Brown, as Principal, and the Great American Indemnity Company, a corporation, and duly qualified for the purpose of making, guaranteeing or becoming surety upon bonds or undertakings required or authorized by the laws of the United States of America, as Surety, are held and firmly bound unto the United States of America, defendant and cross-complainant above named, in the sum of Five Thousand Dollars (\$5,000.00), lawful money of the United States to be paid to the United States of America, we bind ourselves and our successors, jointly and severally, firmly by these presents.

Whereas, Mike Radich and C. T. Brown, doing business under the fictitious firm name of Radich & Brown, cross-defendant in the above entitled cause in said District Court of the United States, Southern District of California, Central Division, are about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment made and entered against the said Mike Radich and C. T. Brown, doing business under the fictitious firm name of Radich & Brown and in favor of the United States of America on or about the 21st day of December, 1945 in the sum of Four Thousand Six Hundred and Forty Five and 25/100 Dollars (\$4,645.25) plus

costs in the sum of Sixty and 27/100 Dollars, (\$60.27), together with interest on such sums at the rate of seven per cent (7%) per annum from the date of Judgment; and [124]

Whereas, the said Mike Radich and C. T. Brown, doing business under the fictitious firm name of Radich & Brown are desirous of staying the execution of said judgment.

Now, Therefore, the condition of the above obligation is such that if the said cross-defendant, Mike Radich and C. T. Brown, doing business under the fictitious firm name of Radich & Brown shall prosecute said appeal to effect and satisfy the judgment in full, together with costs, interests and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed and satisfied in full such modification of the judgment and such costs, interest and damages as the Appellate Court may adjudge and award, and if said cross-defendants Mike Radich and C. T. Brown, doing business under the fictitious firm name of Radich & Brown fail to make good their plea, then the above obligation to be void, otherwise to remain in full force and virtue.

In Witness whereof, the Principal has hereunto set his hand and seal and the Surety has caused this bond to be executed by its duly authorized Attorney-in-Fact and caused its corporate seal to be hereunto affixed at Los Angeles, California, this 29th day of January, 1946.

MIKE RADICH

C. T. BROWN

GREAT AMERICAN INDEMNITY COMPANY

(Seal)

By W. J. McKinnon

(Attorney-in-Fact)

State of California, County of Los Angeles—ss.

On this 29th day of January, in the year one thousand nine hundred and Forty six, before me Paul W. Roster, Jr., a Notary Public in and for said County, residing therein, duly commissioned and sworn, personally appeared W. J. McKinnon, known to me to be the Attorney-in-Fact of the Great American Indemnity Company, the Corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the Corporation therein named, and he acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my Official Seal, at my office, in the said County of Los Angeles, the day and year in this certificate first above written.

(Seal)

PAUL W. ROSTER, JR.

Notary Public in and for the County of Los Angeles,  
State of California

My Commission Expires July 26, 1949.

Examined and recommended for approval as provided in Rule 8.

GEORGE H. MOORE and  
HUGH B. ROTCHFORD

By Hugh B. Rotchford

I Hereby approve the foregoing Bond this 6 day of February, 1946.

BEN HARRISON

Judge

Received copy of the within bond this 6th day of February, 1946. Charles H. Carr, U. S. Atty. RM.

[Endorsed]: Filed Feb. 6, 1946. [125]



[Title of District Court and Cause.]

ORDER

Upon reading and filing the Affidavit of Jean Wunderlich, and good cause appearing, it is hereby Ordered that the time for docketing the appeal in the above entitled cause in the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby extended to and including March 30, 1946.

Dated: March 1, 1946.

PEIRSON M. HALL

Judge

[Endorsed]: Filed Mar. 1, 1946. [126]

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 130 inclusive contain full, true and correct copies of Complaint; Answer with Counter-Claim and Cross-Claim; Order Bringing in Additional Parties on Counter-Claim and Cross-Claim filed July 24, 1945; Answer of C. B. Stratton, etc.; Answer of Jack Wilcox to Counter-Claim and Cross-Claim; Answer of Walter S. Roeder to Counter-Claim and Cross-Claim; Answer of Galen B. Finch to Counter-Claim and Cross-Claim; Answer of Mike Radick et al., etc. to Counter-Claim and Cross-Claim; Amended Counter-Claim and Cross-Claim; Order Bringing in Additional Parties on Counter-Claim and Cross-



Claim; Stipulation filed October 11, 1945; Answer of Otto Davis to Counter-Claim and Cross-Claim; Stipulation to Submit Cause for Decision upon Agreed Statement of Facts together with Exhibit A thereto; Memorandum of Points and Authorities of United States of America; Trial Memorandum of C. B. Stratton; Points and Authorities of Mike Radich et al., etc.; Memorandum of Points and Authorities of Walter S. Roeder; United States Exhibits A to F inclusive; Memorandum Opinion; Findings of Fact and Conclusions of Law; Judgment; Stipulation re Supersedeas and Cost Bond; Notice of Appeal; Costs and Supersedeas Bond; Order Extending Time to Docket Appeal; and Designation of Record on Appeal and Affidavit of Mailing which, together with copy of reporter's transcript, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$28.55 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 27 day of March, A. D. 1946.

(Seal)

EDMUND L. SMITH,  
Clerk,

By Theodore Hocke  
Chief Deputy Clerk.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, November 23, 1945

Appearances:

For the Plaintiff and Cross-Defendant D. B. Stratton:  
Sims, Walbert & Iasigi; by J. H. Sims.

For Cross-Defendants Radich & Brown and Clarence  
A. Davis: George H. Moore, Hugh B. Rotchford and  
John R. A. Girling.

For Cross-Defendant Gallen B. Finch: James V.  
Brewer.

For Cross-Defendant Melvin Myers: (Not served.)

For Defendant and Cross-Complainant United States  
of America: Cameron L. Lillie, Assistant United States  
Attorney.

For Cross-Defendant Jack Wilcox: Edward Payson  
Hart and Horace Heffernan.

For Cross-Defendant Walter S. Roeder: W. C. Fraser.

For Cross-Defendant Otto Davis: Stephen Bedford.

Los Angeles, California; November 23, 1945; 9:30  
O'clock A. M.

The Court: Gentlemen, let us make another effort  
this morning and see if we can determine what issues  
it is necessary to establish by evidence.

Under paragraph 1 of the stipulation that was set  
aside, as I understand it. Is there any conflict about that?

Mr. Lillie: No conflict in respect to that paragraph,  
your Honor.

The Court: As I understand it, there is no question that the Stratton Construction Company was the general contractor on this job as alleged in the complaint and the Government owes him the amount that he claims in the complaint unless it has a counter claim by reason of the accident that is referred to in the cross-complaint. Is that true?

Mr. Lillie: That is true.

Mr. Sims: That is the situation.

The Court: Is there any question as to the ownership of the bulldozer?

Mr. Girling: As far as the bulldozer itself is concerned it was owned by Radich and Brown. As far as the carryall, if it was attached to the bulldozer, it was not.

The Court: The bulldozer was owned by Radich and Brown?

Mr. Girling: That is right.

The Court: Is there any dispute that the defendant [4\*] Davis was operating the bulldozer at the time of the accident?

Mr. Girling: None at all.

The Court: Is there any dispute to the effect that it was an unavoidable accident or is it admitted it was through the careless operation of the bulldozer that the damage occurred?

Mr. Lillie: That was stipulated to in the original stipulation.

The Court: I am trying to determine what the situation is now.

\*Page numbering appearing at top of page of original Reporter's Transcript.

Mr. Girling: In order to answer your Honor's question, as far as my clients are concerned, I shall have to add something to that. What your Honor has asked I cannot answer just as the question is put.

The Court: I am trying to ascertain whether or not we are going to have to go into the details of the operation of the bulldozer whereby it came in contact with the standing airplane, as I understand it.

Mr. Girling: I believe you will have to do that, your Honor.

The Court: Is there any question that the airplane was standing still at the time the bulldozer collided with it?

Mr. Girling: I am informed it was standing still.

Mr. Hart: In so far as my client is concerned, your [5] Honor, I am willing to stipulate that the damage was due proximately to the negligence of the defendant Davis.

Now, I understand the issue will be who in addition to Davis would be liable.

Mr. Girling: I must ask counsel to go further if that is a defense because I certainly intend to prove, if it is not stipulated, that Davis, as far as my clients are concerned, was not controlled by them or either of them.

The Court: I am trying to avoid that because I realize that probably when we boil it down it will be a question as to whom Davis owed allegiance, you might say. It is going to resolve itself into a question of whether Davis was the employee of Radich and Brown or under the direction of Radich and Brown or whether he was under the direction of others—different persons entirely. In other words, we will probably have to take evidence. We will unquestionably have to take evidence as to the

details of the relationship between the parties; but I am trying to ascertain whether there is any dispute as to the fact of the accident and that the damage was caused by the negligent operation of the bulldozer.

Mr. Girling: I cannot stipulate the driver of the tractor was negligent.

The Court: All right. Now, is there any dispute as to the amount of damages to the airplane?

Mr. Lillie: I have a stipulation from each of the attor- [6] neys to the fact that it was a reasonable value of the damage.

The Court: And that is some \$4500?

Mr. Sims: It is the exact amount the plaintiff sued for.

Mr. Lillie: \$4647.35.

The Court: It is stipulated, as I understand it, that that was the reasonable amount to replace the airplane in the same condition it was before the collision.

Mr. Sims: That is right.

Mr. Lillie: Yes.

The Court: It is so stipulated all around?

Mr. Lillie: Yes.

The Court: Then I understand the issues to be determined are whether or not the operation of the bulldozer was negligent and, second, of course if it was not that ends the case. If the operator was negligent who, if anybody, besides the operator is liable? Isn't that the real issue, gentlemen?

Mr. Lillie: That is the real issue, your Honor.

The Court: You may proceed.

Mr. Lillie: If the Court please, I would like to make a statement before we proceed. I would like to inform the Court what transpired. The military personnel which



the Government would use as witnesses in this case have been dispersed in the last six months and are in other parts of the [7] country and not available. When we were informed the trial was set down for Friday morning I immediately got out a subpoena for Davis, the operator, and requested the marshal to serve him in Blythe, where he was working for one of the former partners of Radich and Brown, Mr. Brown. The marshal went down there and was unable to locate Mr. Davis and so informed me on Wednesday afternoon.

I immediately contacted Mr. Ferguson, of Radich Company, and he referred me to Mr. Brown's office. I contacted a Mr. Parkinson there, who I believe is one of Mr. Brown's superintendents, and he informed me that Mr. Davis was at Blythe; that he was staying at the bungalow hotel; that he was working on the California Lettuce Company land 20 miles south of Blythe.

I contacted the marshal and gave him the information I obtained and he left Wednesday evening for Blythe. He got down there Wednesday and went to the bungalow hotel and Mr. Davis was not there.

Mr. Ross, the marshal, informs me that he contacted Mr. Davis' roommate, Mr. Richardson I believe, and he informed him that Mr. Davis had returned to Los Angeles.

Mr. Ross then went out to the job and was unable to find Mr. Davis and contacted Mr. Brown. Mr. Brown informed him that Mr. Davis was to be in court here at 8:30 this morning; that he had left Monday for Los Angeles for his vacation and [8] so that he could appear in court at 8:30 this morning, but so far Mr. Davis has not appeared and I think that he is the determinative witness in this action.

I spoke to Mr. Girling about it and he said he has never seen the man or met him but that he was to be at his office at noontime. I spoke to Mr. Parkinson Wednesday afternoon. Mr. Parkinson informed me that he was going to call Mr. Brown Wednesday night and he would ask Mr. Brown to produce Mr. Davis in court at 8:30. But in order to be sure of his being here I sent the marshal down on Wednesday night and he was unable to serve him.

The Court: Does anybody know where Mr. Brown is?

Mr. Girling: Since I am personally representing him I can give the Court this information from Mr. Rotchford. I determined the fact that he was working for Mr. Brown and either upon Tuesday afternoon or Wednesday—I think it was Tuesday, I called Mr. Brown's office and told him I would need him and felt of course that he was here in the city. I am not sure whether it was Mr. Brown or some other man. It was a man's voice. He said that they knew him and I said we wanted him in court Friday morning not later than 9:30 and would like to have him come in my office first. He said they were informed that he was in Blythe but they would telephone him and have him come to my office at noon today. He did not come there and when I left my office it was exactly 8 minutes after [9] 9:00 and I told my secretary that I was expecting him in the office over the noon hour and to give him a magazine and have him make himself comfortable and I would see him when I came from the courtroom at noon.

I have never seen the gentleman. I have never talked to him. All I know about him was what was prepared in a stipulation which, as I understand now, has gone off the air, so to speak.

The Court: Gone with the wind.

Mr. Girling: But that is all I can tell you about him. It seems to me there would be no necessity for me to subpoena my own client when he was advised by my employer that he would have him in town. I am sorry they are having this difficulty. I did not anticipate it and it is something not of my doing.

Mr. Lillie: I might say the Government through the marshal's office has made every effort to obtain this man.

The Court: Are you able to proceed without him?

Mr. Lillie: I do not believe so. We might proceed to some extent if the Court desires to. I can only call one witness. It might be if Mr. Girling called his office the man might be there at this time.

Mr. Girling: He wasn't to be there until noon.

The Court: Gentlemen, I am going to continue this case from day to day until we get him, if he is a necessary witness. [10]

Mr. Girling: Could we do this: let me offer a suggestion. Cannot we proceed? You have in your files—I think I came across a carbon of it here—a statement as to what he would testify if he took the stand. I will enter into a stipulation that—

Mr. Lillie: Will you state that would be his testimony? I have a sworn statement.

Mr. Girling: A statement he gave you?

Mr. Lillie: Yes.

Mr. Girling: Sworn to? Might I see that? It might be that I will stipulate as to what he would testify.

Mr. Lillie: Yes.

Mr. Hart: Put that in as his direct evidence and cross examine him later.

Mr. Girling: So far as I am concerned I will stipulate that would be his testimony here on the stand but I want the stipulation to go further, and that is in the event he does appear I am not precluded from putting him on the stand.

Mr. Lillie: That is all right.

Mr. Hart: The defendant Wilcox will so stipulate.

Mr. Sims: I so stipulate.

Mr. Bedford: Is that the same stipulation that was included in the stipulation—the same statement? If it is the same we have no objection.

Mr. Fraser: We so stipulate. [11]

Mr. Sims: So stipulated.

The Court: May it be stipulated the sworn statement may be introduced in evidence and that he would testify in accordance with said sworn statement? This is so that we may not have to read it in its entirety for the record.

Mr. Girling: That is agreeable to me.

Mr. Hart: Yes.

Mr. Brewer: Yes.

The Court: It is the same language, is it not?

Mr. Lillie: Yes, taken directly from the statement.

Mr. Bedford: Yes.

Mr. Fraser: Yes.

Mr. Sims: Yes.

Mr. Lillie: Yes.

The Court: Then have it marked Government's Exhibit A.

(The document referred to was received in evidence and marked Government's Exhibit A.)

The Court: Does that enable you to proceed?

Mr. Lillie: I will call Mr. Cox, Jesse M. Cox.

The Court: May I ask what you intend to prove by that witness?

Mr. Lillie: Yes. If the Court please, Mr. Cox will corroborate the statement that was received in evidence.

The Court: Is that necessary?

Mr. Lillie: If it is not then I shall not call Mr. Cox [12] at this time, but the Government will be unable to proceed. It will be necessary to have Mr. Davis to determine who he was paid by.

The Court: Would this witness testify as to that?

Mr. Lillie: No.

The Court: Let us not worry about corroboration until we find a conflict.

Mr. Hart: There is a statement of Mr. Cox here. Perhaps we can stipulate that will be his testimony.

Mr. Brewer: I have not examined it.

Mr. Girling: Yes, we can stipulate to that.

The Court: I am trying to get this down to where we can determine what the conflicts are.

Gentlemen: We have referred to this "Clarence A. Davis" but his correct name seems to be Clarence A. Davis, D-a-v-i-s. He signs his name Davis and the statement is made out in that name but the stipulation that was heretofore entered into and abandoned and the other papers refer to him as Clarence A. Davis. Will you stipulate it is one and the same person and his true name is Davis instead of Davies?

Mr. Sims: So stipulated.

Mr. Girling: So stipulated.



Mr. Hart: So stipulated.

Mr. Brewer: So stipulated.

Mr. Lillie: So stipulated. [13]

Mr. Bedford: So stipulated.

Mr. Fraser: So stipulated.

Mr. Brewer: I am ready at this time to stipulate on behalf of the cross-defendant Finch that if Mr. Cox was called to the stand he would so testify.

The Court: Do the parties desire to stipulate that if Mr. Cox were called to the stand as a witness he would testify in accordance with the affidavit on file, reserving the right to any person if he so desires, to call Mr. Cox for further examination?

Mr. Girling: So stipulated.

Mr. Hart: Yes.

Mr. Brewer: Yes.

Mr. Bedford: Yes, so stipulated.

Mr. Fraser: I would like to so stipulate, your Honor, with the privilege of at the time he is called he may explain a certain statement here that is in question at this time.

Mr. Sims: Stratton so stipulates.

The Court: Well, call him now.

Mr. Lillie: May I offer this as Government's exhibit next in order?

The Court: Yes, Government's Exhibit B.

(The document referred to was received in evidence and marked Government's Exhibit B.)

Mr. Lillie: Mr. Cox, will you take the stand. [14]

JESSE M. COX,

called as a witness on behalf of cross-defendant Finch, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Jesse M. Cox.

Direct Examination.

By Mr. Fraser:

Q. Mr. Cox, on the morning of May 2, 1944, were you employed by Mr. Roeder? A. Yes.

Q. And in what capacity? A. Foreman.

Q. And at that time what work were you doing at that particular place? A. Pipeline job.

Q. And was that at Palm Springs?

A. Yes, sir.

Q. And were you present when your employer, Mr. Roeder, called upon Mr. Wilcox or his foreman, Hank, and talked to him—that is that morning?

A. Yes, sir.

Q. What is Hank's last name again?

A. I couldn't tell you.

Q. But Hank was foreman, if you know, for Mr. Wilcox? [15] A. Yes, sir.

Q. And did you hear any conversation between Mr. Roeder and Mr. Wilcox pertaining to the use of certain equipment down there at the base? A. Yes, sir.

Q. What was the nature of that conversation, if you remember?

A. Well, Mr. Roeder asked Hank if he would send his dozer over or operator over and have him to level down a strip of ground so our trenching machine could go through.

(Testimony of Jesse M. Cox)

Q. That leveling work was on the work that you had started out to do?      A. Yes, sir.

Q. And what was Hank's reply?

A. He said, "Sure," he could have it any time he was ready.

Q. He said he could have it any time he was ready?

A. Yes, sir.

Q. Was Mr. Wilcox and you ready for it at that time?

A. No, I wasn't ready at the time. I had to set some stakes.

Q. And did you set those stakes?

A. I set the stakes and Hank came over and said that the dozer was ready any time I was. I told him okay.

The Court: Who was Hank employed by? [16]

Mr. Fraser: I understand he is foreman for Wilcox Construction Company.

Mr. Hart: That name is Henry Goodine.

The Court: May I ask as a matter of information so I can get the picture a little more clearly in my mind. Stratton was the general contractor?

Mr. Fraser: Yes, sir.

The Court: And there were certain subcontractors?

Mr. Fraser: Yes.

The Court: Who was the first subcontractor under Stratton Company?

Mr. Sims: The first one was Roeder and then Wilcox. They were both subcontractors under Stratton for portions of the work in the principal contract.

Mr. Fraser: Two different types of work.

The Court: And then Radich & Brown were subcontractors under—

(Testimony of Jesse M. Cox)

Mr. Sims: No, no.

Mr. Girling: Under no one.

Mr. Lillie: They merely owned the equipment.

The Court: Who were they supposed to be employed by?

Mr. Girling: They were not employed by any of these parties.

Mr. Hart: They owned the equipment, the bulldozer.

Mr. Girling: That is all; just owned it. [17]

The Court: At the time of the accident whose subcontract was being worked on?

Mr. Sims: Mr. Roeder's.

Mr. Lillie: Yes, Mr. Roeder.

The Court: And where does Wilcox come into the picture?

Mr. Lillie: He leased the equipment to Mr. Roeder or rented it.

The Court: It was Roeder's subcontract but there was a leasing of the equipment by Wilcox.

Mr. Lillie: Wilcox was also a subcontractor for a different portion of the work, the same as Roeder was.

The Court: Where does this man Finch come into the picture?

Mr. Girling: I think I can answer the question by stating—

The Court: I am not binding you gentlemen by your statements, you understand. I am simply trying to get the picture.

Mr. Girling: Finch had a contract or was doing some farming or agricultural leveling out there and we leased Finch the bulldozer so he could do the work and sent out a driver with it and unknown to us this tractor went

(Testimony of Jesse M. Cox)

through all these other hands and it wound up over in an Army air base to a prime contractor and subcontractor. That is the story. Finch had nothing to do with the Army air base contract at all. [18]

The Court: May I ask, had this equipment been used by the prime contractor himself?

Mr. Sims: No, it was not.

Mr. Girling: We don't know who it was used by.

Mr. Sims: It was not.

The Court: Had it ever been used by the prime contractor?

Mr. Sims: Never had.

Mr. Lillie: I think I can clear it up. The equipment was leased by Radich & Brown to Finch who in turn leased the bulldozer to Myers and Davis and from Myers and Davis it was leased to Mr. Wilcox and Mr. Wilcox rented or leased it to Mr. Roeder and Mr. Wilcox was a subcontractor as well as Mr. Roeder, and in the performance of Mr. Roeder's work, he required some work to be done by that type of machine and, as I understand it, he went to Mr. Roeder and asked Mr. Roeder if he could send the machine over. He was using it at a different portion of the air base. He wanted it sent over to this spot and dig a ditch for him. Mr. Wilcox went to Mr. Roeder—Mr. Roeder went to Mr. Wilcox and asked him to send the machine over to dig this ditch that he was required to have dug and Mr. Goodine is the employee, as I understand it, of the Wilcox Company and Cox is the employee of Mr. Roeder.

The Court: And Goodine is the man whom we are calling "Hank"? [19]

Mr. Lillie: That is correct.



(Testimony of Jesse M. Cox)

Mr. Hart: That is correct.

The Court: All right, you may proceed.

Q. By Mr. Fraser: Did Mr. Goodine come over at the same time, Mr. Cox? A. Yes, sir.

Q. What was done?

A. When he came over and asked if the stakes and things were ready and I told him they were, he said that the dozer would be over and that they would have to go get some planks and plank it across the taxiway, so Hank and I went over—took my pickup and went and got some 2-inch timbers and came over and we got back and the dozer was there. We planked it across this runway, over to the side we wanted leveled down.

Q. And who was operating the bulldozer at the time?

A. Mr. Davis.

Q. Do you know his first name?

A. No, I don't.

Q. Was he one of Mr. Roeder's employees?

A. No, sir.

Mr. Girling: Objected to as calling for a conclusion and opinion of the witness and ask the answer be stricken. That is one of the things your Honor will have to determine from this case. This witness cannot testify to that. That [20] is in issue.

The Court: How do you know he was an employee of Mr. Roeder?

The Witness: I happened to be Mr. Roeder's foreman and knew the men he had employed on the job.

Mr. Sims: I move that be stricken.

The Court: Were all of the employees of Roeder under you?

The Witness: Yes, sir.

(Testimony of Jesse M. Cox)

Mr. Girling: I still think this witness can only testify as to what is apropos of what he said.

The Court: Was he on your payroll?

The Witness: No, sir.

Mr. Girling: That is not governing. It is a question of special employment.

The Court: I will strike out the answer that he was not employed by him. I will let stand the answer that he wasn't on the payroll over which he had control.

Q. By Mr. Fraser: Did you give Mr. Davis, the operator of the bulldozer, any instructions as to how the work was to be done?      A. No, sir.

Q. Was there any conversation between the two of you as to how the work was to be done?

A. No, sir. [21]

Q. And then did Mr. Davis proceed with the operation of the bulldozer on the strip that you had put the stakes in for him?      A. Yes, sir.

Q. And what were you doing at that time?

A. While he was leveling that one side down I was setting stakes over on the other side of the airplane.

Q. In other words, there were two strips that you were working on?      A. Yes, sir.

Q. And where was that one strip that he was working on with reference to the strip you were putting the new stakes down on?

A. That was on the east side of the airplane that was parked on the taxiway there.

Q. Were you working on the west side of the airplane?      A. Yes, sir.

Q. Do you know how many times the bulldozer went over that one strip that he first started working on?

(Testimony of Jesse M. Cox)

A. Yes. He made three passes over it.

Q. What do you mean by "three passes"?

A. Well, he made three round trips. He took his dozer, knocked it down and then drug back and knocked it down again and would drag back.

Q. Would he start from the plane and go forward?

[22] A. Yes, sir.

Q. And how long would you say that strip was in feet?

A. Oh, approximately 700 feet.

Q. And then would he be back up after he got to the other end and drop his blade and scrape it?

A. Yes, sir.

Q. So he would be in reverse on his way back to the plane, is that correct?

A. That is right.

Q. And he made three of those round trips, as you call it?

A. Yes, sir.

Q. And after he completed that part of the strip what did Mr. Davis do?

A. Well, Mr. Davis asked me if we would have to plank across the taxiway this plane was parked on—it was parked on what they call a "hard stand" and there was a strip of paving went on back, I believe, to the wash rack in the back and he asked me if we would have to plank across that and I told him no, I didn't think it was necessary; that he could go around it.

Q. And did he?

A. Yes, sir.

Q. And then just describe what he did at that time.

A. Well, he started down. He came right back around to [23] the plane and started west. He started at the plane and pushed his dirt going west and then dropped his blade coming back—backed into the plane.

(Testimony of Jesse M. Cox)

Q. How long was that strip?

A. That was approximately 200 feet.

Q. So he made one trip up to the end and then backed up?

A. Yes, sir.

Q. And at the time he backed up did anything unusual occur?

The Court: I thought his testimony in that respect was stipulated to.

Mr. Fraser: That is correct.

The Court: Are we going to cover the same ground?

Mr. Fraser: No.

Q. By Mr. Fraser: Did you give any instructions as to how to set the blade?

A. No, sir.

Q. Did you give any instructions at all to Mr. Davis, the operator of the bulldozer?

A. No, sir.

Mr. Fraser: That is all.

Cross-Examination.

By Mr. Hart:

Q. Was Mr. Roeder present at any time during the con- [24] versation you just testified to?

A. He was present when he was asked for the dozer.

Q. Was Jack Wilcox present at any time during those conversations?

A. I don't know Jack Wilcox.

Q. As a matter of fact there was just Henry Goodine that those conversations were had with regarding the use of the dozer?

A. Yes, sir.

Q. Now, were you present at all times during the operation of that bulldozer prior to the accident?

A. No, sir.

Q. How much of the time were you there after it started its operation at that particular point?

A. When he started is when he first started to work.

(Testimony of Jesse M. Cox)

Q. Started the work that you had assigned him to do?

A. Well, as quick as he come across the hard stand and started their leveling I went ahead and set my stakes on the west side of the plane and wasn't with the dozer.

Q. Was Mr. Goodine present at any time while that bulldozer was being operated on Mr. Roeder's job?

A. Not after he started, no.

Mr. Hart: That is all.

The Court: Was he there when he commenced the work?

The Witness: Yes. [25].

Q. By Mr. Hart: What did Mr. Goodine do while he was there?

A. He told the operator—gave the operator his instructions to level down—where to level.

Q. And what were those instructions?

A. To go right down those stakes I had set. I had a center row of stakes and he told him to level it down—his blade was wide enough—and just center his blade on the stakes and knock them down.

Q. Who had installed the stakes? A. I did.

Q. And prior to the collision between the bulldozer and the airplane what did you say, if anything, to the operator?

A. I didn't say anything. The first time I talked to the operator was when he asked me if he had to plank across that taxiway.

Q. Did you yell at him to warn him of his approach toward the plane? A. Yes.

Mr. Hart: That is all.

Q. By Mr. Girling: Mr. Cox, you mentioned something about a payroll. Was the use of this bulldozer ever paid for? A. Well, I presume it was.



(Testimony of Jesse M. Cox)

Q. To whom did the money go to pay for its use?  
[26]

A. I don't know. I don't have anything to do with that.

Q. Did you see Mr. Radich or Mr. Brown around there at any time?

A. I wouldn't know them.

Q. Have you mentioned the names of all of those persons you did see around there who had anything to do with this bulldozer?

A. There was only one person on the field that I knew and that was the fellow that they called "Hank."

Q. You had known Hank for some time?

A. Yes, sir.

Q. And Hank was the man you asked about getting the bulldozer?

A. I didn't ask.

Q. Who asked him? Your boss?

A. Mr. Roeder.

Q. And you were there?

A. Yes, sir.

Q. And did you and Hank go over to the edge of this runway or this strip together when the planking was laid for the dozer to cross it?

A. Yes, sir.

Q. Who helped that—lay that planking across the taxiway? [27]

A. Hank.

Q. No one from Radich & Brown?

A. No.

Q. Just Hank and yourself?

A. Yes, sir.

Q. Now, this leveling was to be done in order that certain water mains could be laid, isn't that true?

A. Yes, sir.

Q. Was the leveling to be done on each side of this strip?

A. Yes, sir.

(Testimony of Jesse M. Cox)

Q. How many rows of stakes in all were necessary?

A. There was one row.

Q. On each side of the strip?

A. On each side of the strip, yes.

Q. That would be two in all? A. Yes.

Q. And in order to level the ground how many passes would the dozer make on each side of the strip?

A. Well, he made three passes on one side and one pass, one round pass on the other side.

Q. How long before he got there with the dozer were the stakes set by you?

A. Oh, approximately three or four minutes.

Q. In other words, you were just a little bit ahead of [28] him getting the stakes in the ground before he started knocking them down?

A. No; they were finished.

Q. So all of the stakes had been set? A. No.

Q. When he arrived with the dozer?

A. No. All of those on the east side had been set.

Q. He arrived then with the dozer on the east side first? A. Yes, sir.

Q. And you had already set all of those stakes?

A. Yes, sir.

Q. What did you say to him about hitting the stakes?

A. I didn't say anything.

Q. Who told him anything about hitting these stakes?

A. Hank.

Q. Hank told him that? A. Yes, sir.

Q. Neither Mr. Radich or Mr. Brown, so far as you know, told him how to hit any stakes?

A. No, sir, not that I know of.

(Testimony of Jesse M. Cox)

Q. Did anyone else in your presence, as far as you know, ever tell him, other than Hank, how or where to hit any stakes?      A. Not in my presence, no. [29]

Q. And, as far as you know, no one did?

A. That is right.

Q. When he was hitting the stakes with the dozer where were you?

A. I was setting stakes on the west side of the airplane.

Q. When he finished with those on the east side did he then go to those stakes on the west side?

A. Yes, sir.

Q. Were you still there when he came over on the west side?      A. Yes, sir.

Q. Had you any more work to do there?

A. Not right there, no.

Q. Did you remain there on the west side while he knocked those stakes down?      A. No.

Q. Did you see him knock down any of the stakes on the west side?      A. Yes.

Q. Whereabouts in reference to this plane when you were—when you saw him knock down the last stake?

A. Well, I was up at—on the west side and come back to my right about two or three hundred feet and I was setting a row of stakes over there. [30]

Q. Some more stakes?      A. Yes.

Q. Which he would have had to knock down with the dozer?      A. No, sir.

Q. Or was someone else going to knock them down?

A. No; there were none there.

(Testimony of Jesse M. Cox)

Q. I am talking about the stakes you were setting up. What was that for?

A. That was for the ditch.

Q. But not for the dozer to touch?

A. That is right.

Q. You were about 300 feet away from him?

A. That is when he pulled out on the end and knocked down the last stakes, yes, sir.

Q. Were you watching him as he was coming up knocking down these stakes?      A. No.

Q. Did you see him knock down any of the stakes on the west side?      A. The last one, yes.

Q. And you were 300 feet away at that time?

A. Yes, sir.

Q. Is that when you started to shout at him or yell at him or something? [31]      A. No, sir.

Q. When was that?

A. That is when he backed into the airplane.

Q. How far away from you was he at that time?

A. Well, as he started backing towards the airplane I started walking over that way to see if the leveling was okay on the east side of the plane.

Q. And that was the east side of the strip?

A. Yes, sir.

Q. And did you intend to see if it was okay on the west side of the strip too?      A. I could see that.

Q. You had already determined that?

A. Yes, sir.

Q. As foreman it was part of your work to determine whether it was all right?      A. Well, yes.

(Testimony of Jesse M. Cox)

Q. And if it had not been all right what would you have done?

A. I would have went and talked to Hank.

Q. You would have talked to Hank?

A. That is right.

Q. Did Hank have anything to do with this leveling there?

A. Nothing, only to tell the operator that he wanted it [32] leveled, as far as I know.

Q. I understood you to say it was Mr. Roeder who approached to see that the dozer would come over there.

A. Mr. Roeder asked him, Hank, if the dozer—if he could get the dozer and operator to come over and do a little leveling for him.

Q. That was Mr. Roeder's contract, was it not?

The Court: That calls for a conclusion of the witness.

Q. By Mr. Girling: What was Roeder working on out there?      A. Pipeline.

Q. Where the leveling was being done?

A. Yes, sir.

Q. Wilcox was working on another entirely different job, wasn't he?      A. Yes, sir.

Q. And this leveling was being done by this dozer on Roeder's contract?      A. Yes, sir.

Q. For water main installation?      A. Yes, sir.

Q. And Mr. Roeder asked Hank, Mr. Wilcox' foreman, about sending the dozer over?      A. Yes, sir.

Q. And you went up to see if the leveling had been [33] done properly?      A. That is right.

Q. And, as I understand it, if it had been improperly done you would have gone to Hank?      A. Yes, sir.



(Testimony of Jesse M. Cox)

Q. You would not have said anything to the operator at all, the operator of the dozer? A. No.

Q. It was properly done? A. Yes, sir.

Q. Did you point out any stakes to the operator of the dozer that he was to knock down when you finally got the dozer across the strip so he would know what stakes you meant? A. No, sir.

Q. I understood you to say there were some stakes not to be knocked down at all. A. That is right.

Q. Did you differentiate those stakes from the stakes that were to be knocked down? A. No, sir.

Q. Have you any idea how the driver or operator of the dozer knew which were to be knocked down and which were not to be knocked down?

A. If he had knocked down the other stakes he would [34] have had to plank across the runway and I did not think he would pull across the runway without planking across it.

Q. You planked him across to knock down some?

A. Yes, sir.

Q. And while you were planking the runway to knock down certain stakes were those stakes designated to him to be knocked down? A. Yes, sir.

Q. How were those designated to him? By a note or memorandum or how? A. Hank told him.

Q. But at no time did you ever meet either Mr. Radich or Mr. Brown there? A. No, sir.

Q. And you did not see them around or hear anyone who purported to use their names? A. No, sir.

Q. And the only person you heard give any order whatever to the operator of this dozer was Hank, is that right? A. Yes, sir.

Mr. Girling: That is all.

(Testimony of Jesse M. Cox)

By Mr. Brewer:

Q. Mr. Cox, you spoke about a strip. That is a landing strip, isn't it, a landing runway?

A. Yes, sir, taxiway. [35]

Q. And the water lines were to be laid on either side of that runway, is that it?

A. It was to be laid on one side of the landingway and to cross a taxiway.

Q. At any rate, this runway ran north and south and these two lines of stakes were on either side running north and south, on either side of the runway or strip, landing strip?

A. No. The pipeline run the same direction as the runways.

Q. That is what I mean. One of them was on the west side and one on the east side of the strip.

A. No, if I remember right it is on the south side of the runway.

Q. On which side of the strip?

A. And on the east and west side of the strip, the parking hard stand.

Q. Where was the airplane parked?

A. Right in the center of where our ditch was to go.

Q. In between the two ditches?

A. (No answer.)

Q. On the strip?

A. No. It wasn't in between them. The ditch was to go right straight through there. Just one ditch.

Q. Well, what I was getting at, was it on the landing [36] strip or runway or neither, where the airplane was?

A. It was on the parking area.

(Testimony of Jesse M. Cox)

Q. Then it would not be on the strip or on the runway?

A. Well, I don't know. I cannot get it in my head what you call the strip and what you call the runway.

Q. Well, I am just using the words you have used so many times.

A. Well, the taxiway is what I call the taxiway and that is where they taxi their planes off of the runway and this plane was sitting on the taxiway or hard stand, whichever they call it. It was where they park the airplane off of the runway.

Q. What I was getting at, you were using the term "strip" on the east side of the strip and west side of the strip where this line of staking was, and I was trying to determine what the location of the airplane was with reference to that strip.

A. Well, that strip was where the plane was parked. What I had reference to was where the plane was parked. A little strip of paving runs out there and this plane was parked on it.

Q. Then am I right in saying that each of these first two lines of stakes you made was on either side of this plane?

A. On the east side and west side, yes, sir.

Q. Of where the airplane was? [37]

A. Yes, sir.

Q. Was the operator going along the line of those stakes where they had been at the time the accident happened?

A. Would you state that again, please?

Q. Was the operator going along the line of where the stakes had been at the time the accident happened?

A. He was backing up from where he had went down and knocked the stakes down.

(Testimony of Jesse M. Cox)

Q. The same line?            A. The same line, yes.

The Court: May I ask, was a stake placed under the wing of the airplane which necessitated the operator going that close to it?

The Witness: No. There was no stake that was in line with it but the stake closest to it—the closest stake to the plane was approximately 30 feet away, I would guess.

The Court: How would the operator know where to stop?

The Witness: Well, he was to level up to the plane.

The Court: Had he been given any such instructions?

The Witness: Yes, sir.

The Court: By whom?

The Witness: By the fellow called Hank. Our ditch was to go straight through. They were to move—

The Court: Your ditch eventually was going to go underneath the airplane wing? [38]

The Witness: Yes, sir.

The Court: How were you going to level the land under the wing, or was it already level?

The Witness: That was level.

The Court: Then the leveling was to be done on each side of the airplane?

The Witness: Yes, sir.

The Court: Because the airplane was then at rest on a piece of level ground?

The Witness: Yes, sir.

Q. By Mr. Brewer: Do you know Mr. Finch?

A. I don't believe I do.

(Testimony of Jesse M. Cox)

Q. Any time before this accident did you ever see him there giving directions to Mr. Davis, the operator of the bulldozer?

A. I don't remember of anyone talking to him.

Q. Well, do you know the directions there, Mr. Cox? That is, east, south, north and west? Are you familiar with it so far as the objects you have been talking about are concerned?

A. Well, I could not swear that the directions would be right but I know just about what I figure was the directions.

Q. It might be helpful if you will tell us which way the plane was facing, what direction.

A. The plane was facing north—that is, if I am not [39] mistaken.

Q. And which directions was the bulldozer going when the accident happened?

A. East and west.

Q. And which wing of the airplane was struck?

A. The left wing.

Q. And the bulldozer was backing up?

A. Yes, sir.

Q. Was it close to the end of the plane where the stakes were at the time the accident happened?

A. Well, he could have stayed about 20 or 25 feet away from it and the ground would have been all right.

Q. Was it close to the end of the line of stakes where the accident happened?

A. Well, about—around 25 feet or something like that.

Q. Beyond the end of the line of stakes—

A. East of the last stake.



(Testimony of Jesse M. Cox)

Q. He had not knocked down the last stake?

A. Yes, he had knocked it down and gone past the last stake.

The Court: In other words, as I understand it, there was no grading to be done under that wing?

The Witness: That is right.

Q. By Mr. Brewer: How long overall was the bulldozer and blade? [40]

A. Oh, I would say about 14 feet.

Mr. Brewer: I have no further questions.

The Court: Does anybody else want to examine this witness?

Mr. Hart: Could we use the blackboard for the purpose of having the witness draw a rough sketch?

Mr. Lillie: I have a sketch here. As soon as counsel sees it I will introduce it. It is a true diagram of the layout there.

Mr. Hart: Just one question.

Q. By Mr. Hart: Mr. Cox, do you know who Mr. Goodine received his information from upon which he gave instructions to Mr. Davis?

A. Mr. Roeder told him.

The Court: Who?

The Witness: Roeder.

Mr. Brewer: I might say, your Honor, that there some other testimony of this witness that is not directly cross examination but it has to do with something else, another phase of the case.

The Court: You may have all the time you need to develop your case. You may proceed.

Mr. Lillie: Might I interrupt for a moment?

Mr. Brewer: Yes, go ahead.

(Testimony of Jesse M. Cox)

Mr. Lillie: Mr. Cox, I will show you a diagram, appar- [41] ently of the plane, the parking area and the position of the bulldozer and the direction it was traveling. Also the directions north and south. Does that represent a true diagram of the scene of the accident?

The Witness: That is about as close as it could be.

Mr. Lillie: And that was actually the way the accident occurred, in your opinion, is that correct?

A. Yes, sir.

Mr. Lillie: If the Court please, I will offer this in evidence.

The Court: Has all counsel seen it?

Mr. Girling: I would like to see it with Mr. Hart.

The Court: As I understand it, he came right into the edge of the wing and smashed the edge of that wing?

The Witness: Yes, sir.

Mr. Lillie: I will offer this as Government's exhibit next in order.

Mr. Fraser: No objection.

The Court: It will be admitted.

(The document referred to was received in evidence and marked Government's Exhibit No. 1.)

Q. By Mr. Brewer: Did you go to get the bulldozer when it was procured by Wilcox? A. No.

Q. Did you hear any conversation between Mr. Wilcox or [42] Mr. Goddin and Mr. Davis of Davis & Myers? A. No, sir.

Q. When did you first see the bulldozer, Mr. Cox?

A. When it pulled up to the landing strip to cross it.

(Testimony of Jesse M. Cox)

Q. And that was the first time you saw the operator, Mr. Clarence Davis?

A. Yes, sir. When I was saying "Davis & Myers" I did not mean Clarence Davis. I meant another Davis. The only Davis that I know is the one that was the operator on the bulldozer.

Mr. Brewer: That is all, your Honor.

The Court: Anybody else desire to question this witness?

Mr. Bedford: I would like to ask one question.

Q. By Mr. Bedford: What was this, the air strip that you and Hank planked the bulldozer across?

A. Yes, sir.

Q. And where was the place that you were working the bulldozer, where he was knocking down these stakes with reference to the air strip which you and Hank planked the bulldozer across?

A. I did not hardly get that.

Q. Can you tell us which side of the air strip you were working on on that grading job there, or leveling?

A. On the south side. [43]

Q. And which direction did the air strip run?

A. East and west.

Q. And the bulldozer had come from the north side of the air strip and Hank had planked it across to the south, is that correct?

A. Yes, sir.

Q. Do you know where the bulldozer had been working north of the airstrip?

A. No, sir.

Mr. Bedford: That is all.

(Testimony of Jesse M. Cox)

Cross-Examination.

By Mr. Lillie:

Q. Mr. Cox, did you see the plane after it was damaged?      A. Yes, sir.

Q. Did you look at it?      A. Yes, sir.

Q. I am going to show you some pictures—

The Court: What is the use of going into that when they admitted the amount of damages?

Mr. Lillie: It was merely to assist in identifying the various locations on the diagram that I offered. It does not go to the question of damage.

The Court: I see no reason for taking up time identifying photographs when there is no dispute. Are there any further questions of this witness? [44]

Mr. Girling: One question.

Recross Examination.

By Mr. Girling:

Q. Did you have anything to do with or did you do anything at all toward filling out a time slip for the amount of time the bulldozer put in on this job?

A. No, sir.

Q. Do you know anybody who did?

A. No, sir.

Mr. Girling: That is all.

The Court: Witness excused.

Mr. Lillie: No questions, your Honor.

It may assist the Court if we permit Mr. Fraser to follow up with Mr. Cox with his employer, Mr. Roeder. I have another witness to call, if the Court pleases.

The Court: I don't know. I feel we should follow the regular procedure. Naturally I am interested in who was the employer of Davis and from whom he received payment for his services and his orders.

Mr. Lillie: Then I will call Mr. Ferguson.

EDWIN FERGUSON,

called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your full name.

The Witness: Edwin Ferguson. [45]

Direct Examination.

By Mr. Lillie:

Q. Mr. Ferguson, what is your occupation?

A. President and co-owner of Mike Radich & Company.

Q. Do you have certain duties that you perform in that respect?     A. Yes, sir.

The Court: You will have to speak up.

The Witness: I have a cold, your Honor. I hope you will bear with me.

Q. By Mr. Lillie: On May 2, 1944, and prior thereto, what was your occupation?

A. An employee of Radich & Brown.

Q. Defendants in this action, is that correct?

A. I assume so.

Q. What were your duties in respect to your employment with Radich & Brown?

A. Office manager and rental of equipment.

Q. Did Radich & Brown do business in the equipment rental trade?     A. Yes, sir.



(Testimony of Edwin Ferguson)

Q. Did you keep their books? A. No, sir.

Q. Were they kept under your supervision?

A. Yes, sir. [46]

The Court: Where was their place of business?

The Witness: 3000 Empire, Burbank, between Lockheed and the airport.

Q. By Mr. Lillie: Did you keep their payrolls?

A. They were kept under my supervision.

Q. Did you ever have a man by the name of Clarence A. Davis on your payroll? A. Davis?

Q. Yes. When did his name first appear on your payroll?

A. Oh, I couldn't answer that without going back to the records. I believe it was in 1943.

Q. What was his occupation?

A. Tractor driver.

Q. Did you ever have occasion to have a telephone conversation with Mr. Finch?

A. With Galen Finch?

Q. Yes. A. Several, yes, sir.

Q. Did you ever have a conversation at any time in respect to the rental of this equipment?

A. You are speaking of one of the dozers operated by Davis?

Q. Yes. A. Yes, sir. [47]

Q. When did that occur?

A. About the 20th or 21st of April last year.

Q. Who was present at the time of that conversation?

A. I couldn't answer that.

Q. Was the conversation in your office?

A. I am not sure whether this particular one was in the office telephone or not

(Testimony of Edwin Ferguson)

Q. What was the substance of the conversation?

The Court: Why not let the witness testify as to what he knows about the rental of this equipment to Mr. Finch?

Q. By Mr. Lillie: Will you so testify?

A. Yes. If I may back up just a little. Prior to that, several months prior to that Mr. Finch came to the office and wanted certain equipment, some Case tractors, motor graders and tractors with bulldozers or tractors with carryall scrapers. We rented those to him for certain types of work, such as land leveling, and after that visit to the office he would call for additional equipment when he wanted it.

The one you refer to I am not sure whether it was in the office—whether it was an office call, but that was on or about the 20th or 21st of April and it was for land leveling, for agricultural purposes between Palm Springs Village and Indio.

They were rented to him at the regular prevailing OPA prices. In so far as we are concerned when they were turned [48] over to him they were under his direction, or whatever he might do with them, with the operator staying on our payroll. It was our policy to rent equipment for a certain type of work with the understanding that if there was any change in the operation or type of work that we would be notified.

The Court: Let me ask, when you rented this equipment, do you send an operator along with it?

The Witness: Generally speaking, your Honor, we will not rent equipment unless our operators are permitted to be on our equipment; either on our payroll or on other payrolls, because we have a certain amount of confidence in our own operators.

(Testimony of Edwin Ferguson)

The Court: You want your man on the machine to see that it is operated properly and your equipment is protected. Is that the situation?

The Witness: That is correct.

The Court: So that this equipment was rented and you sent Davis along with the equipment in order that you would have a representative on the equipment who would be looking after your interests? That is the sum and substance of it, is it?

A. That is the sum and substance of it, but I would not say he is "a representative."

The Court: I mean you have a man there that is familiar with the equipment? [49]

The Witness: Yes, sir.

The Court: So your equipment may be protected and not misused?

The Witness: That is correct.

The Court: And also he has the ability to make any repairs that may be necessary?

The Witness: Field repairs, minor repairs, yes, sir, that is correct.

The Court: And if any parts are needed he is the man to telephone in and notify you that he wants certain parts, is that not true?

The Witness: That is right.

Q. By Mr. Lillie: During the period of May 2, 1944, just prior and subsequent thereto, was Mr. Davis on your payroll?

A. Yes, he was.

Q. He was paid by Radich & Brown for his services?

A. That is right.

(Testimony of Edwin Ferguson)

Q. Do you recall whether or not in respect to this machine any repairs were necessary, field repairs, while it was out of your possession?

A. I do not recall anything out of the ordinary other than probably some cable or something like that.

The Court: Do you keep an account on each piece of equipment? [50]

The Witness: As to repairs, yes.

The Court: As to repairs?

The Witness: Yes, sir.

The Court: And as to its use?

The Witness: Yes, sir.

The Court: Have you such an account on this piece of equipment?

The Witness: Not with me. We have in our office. We are supposed to have either, Your Honor, a daily or weekly or monthly record. Some like it by the day and some like it by the week or some may like it by the month.

The Court: What record do you keep here as to each piece of equipment? This equipment represents money to you?

The Witness: Yes, sir; that is right.

The Court: So you keep a record as to what that equipment costs you and what it has cost you to repair and operate and you keep a record as to the use of that equipment and as to who is using it, do you not?

The Witness: Yes, sir.

The Court: So you could determine whether that equipment has produced a profit or loss, can you not?

The Witness: That is correct.

The Court: I want to ask that those reports, gentlemen, be produced.

(Testimony of Edwin Ferguson)

Mr. Girling: Will you bear that in mind? I have no [51] access to the records myself and if the witness will bear it in mind under the admonition of the Court, they will be here.

The Court: I will ask to have them here at 1:30 o'clock this afternoon.

Mr. Girling: He will have to go to Burbank to get them.

The Witness: I can telephone for them. I might add, your Honor, those records are maintained by the operator in the field. They are signed by the party under whom they are working and they are turned in to us either weekly or monthly.

The Court: Does the operator make a report to you and if so how often?

The Witness: Weekly, at the end of each week or within two or three days afterwards.

The Court: And does that report indicate the work he and the piece of equipment is doing?

The Witness: Yes, sir, it does.

The Court: And you retain those reports, do you?

The Witness: Yes, sir.

The Court: And they are a part of your records?

The Witness: Yes. I might add that they are made in triplicate, the first copy going to the party having the work done. In other words, in this case it looks like there are a half dozen, but we get the second copy. The third copy is maintained by the operator or was sent in to us and destroyed if no one else wants it, but there are two copies in the field; [52] the parties having this work done should have the same copy that we have.

The Court: But you have one copy?



(Testimony of Edwin Ferguson)

The Witness: We have one copy, yes, sir.

Q. By Mr. Lillie: And from that copy do you make your billing?

A. Make up our invoices, yes, sir, at the end of the month.

Q. Now, the men that operate this, don't they make a report as to the hours they are working?

A. They have what we call a weekly time card which is another form separate from that. That goes into the timekeeper and as a general rule merely shows his name, social security number and his occupation, such a "tractor operator," and the date. We can at any time during the month—at the end of the month when we compile our sheets of operations we can check those against his time sheets or his time sheets against the operation sheet and if there is any discrepancy we can find out what it is—whether it might be travel time or repair time.

The Court: I want all the records and copies of any billings that you have produced at 1:30 this afternoon.

Mr. Girling: Might I suggest also if the Court would admonish both Mr. Roeder and Mr. Wilcox to bring those copies in which they may have, if any, and your clients too, as well, [53] because, as I said before, it is going to be our contention this was out on a strange mission. We had nothing of this. If they have any I want them introduced or produced or to come in and say they didn't have any. I think it is as fair for them to bring theirs—

The Court: Gentlemen, I want the facts. That is all I am after.

Mr. Girling: I know that, your Honor. That is why I want them in court.

(Testimony of Edwin Ferguson)

The Court: We will not cross that bridge until we come to it.

Mr. Girling: It may save a day or two.

The Witness: I want the invoices, your Honor, to back up my statement.

The Court: I want everything. I want any record you have concerning the operation of this tractor from the time it was charged out to Mr. Finch.

The Witness: I have the day it went out.

The Court: I want the records here. In other words, each one of these parties is passing the buck back and forth between each other and I want to see who is going to finally get the ball.

Mr. Lillie: That is all, your Honor. [54]

Cross-Examination.

By Mr. Bedford:

Q. Isn't it true that your only interest in the type of work that this bulldozer was doing was from a standpoint of the rate of insurance on that equipment?

A. I did not get that.

Q. Isn't it true that your only interest here is the rate of insurance to be paid on that equipment?

A. Our interest is more than the rate of insurance. We are interested at all times in knowing the type of work because land leveling carries the lowest rate of insurance. Underground work carries the highest rate. About the next highest in so far as we are concerned is air fields.

Q. Isn't it true that you would let this equipment for any type of work that it was reasonably suited for if you

(Testimony of Edwin Ferguson)

were notified so that the insurance could be carried in proportion?

A. I would not say yes because there are a lot of people I would not rent equipment to at any price and there are many jobs that we refuse.

Q. Do you recall at any time telling Mr. Otto Davis over the telephone that it was all right for him to use that equipment for different types of work if he would notify you in order that the insurance rate might be changed in accordance with the work the equipment was doing?

A. I don't recall that conversation. [55]

Mr. Bedford: That is all.

The Witness: Our dealing was direct with Mr. Finch.

Q. By Mr. Bedford: At all times?

A. Yes, sir.

The Court: At any time did you have any knowledge that this equipment was being used in any other place other than on Mr. Finch's property?

The Witness: No, sir, not until after this particular accident.

The Court: You had no knowledge of it?

The Witness: No, sir.

Mr. Hart: Bearing in mind it is the contention of certain of the cross-defendants that this bulldozer is an inherently dangerous instrumentality, requiring the peculiar, special knowledge of an operator, I would like to ask your Honor if you are fully familiar with the description of a bulldozer. Otherwise I will ask this witness to describe it.

Mr. Girling: I certainly cannot stipulate that a bulldozer in "inherently dangerous," especially on a government air field and during a time of war.

(Testimony of Edwin Ferguson)

Mr. Hart: I am not asking for a stipulation. I am saying that is the contention of certain of the cross-defendants.

Mr. Girling: No more so than the guns that the soldiers carry on their backs.

Mr. Hart: That is a matter of argument. [56]

The Court: Gentlemen, you can put on evidence what a bulldoze is if you care to. I feel, however, this Court is pretty familiar with a bulldozer. I want to say further that I am strongly of the belief that whoever had control of this bulldozer and the authority to direct its operation is liable for any damage that it may do. In other words, if it is shown here that Radich & Brown were the owners of this bulldozer and it was under their direction you are going to have to convince the Court that they are not liable for the damage caused by it, along with Davis. Now, if Roeder and Wilcox participated in that they may be tied into it. I think that is what we will have to thrash out here—the relationship between the parties.

I have spent considerable time on research on this matter and as far as the law is concerned I am ready to rule when I get the facts.

Q. By Mr. Hart: What qualifications do you require, Mr. Ferguson, of an operator of a bulldozer before you put him on your payroll?

Mr. Girling: Objected to as irrelevant and immaterial.

Mr. Hart: This is on the point of peculiar knowledge.

The Court: Objection overruled.

The Witness: The Operating Engineers, Local 12, furnish all operators. It is only necessary to call them for an operator. [57]



(Testimony of Edwin Ferguson)

The Court: Is that through a hiring hall?

The Witness: Through the union hiring hall. However, we go a little beyond that. We try to locate our man first and ascertain who he has worked for, if possible, because you see there is a lot of money involved in the equipment and it can be ruined in a few hours' time by careless operation.

The Court: And can also do a great deal of damage in a very short time by careless operation.

The Witness: That is correct, you can.

The Court: It works both ways.

Q. By Mr. Hart: Mr. Ferguson, do you recall where you sent the pay checks for Mr. Davis during the month of April, 1944?

A. I do not. We would have to check our records. About 50 per cent of our employees send in their cards and the checks are mailed to their homes. Others are mailed in to the field. In this case I don't recall.

Q. Do you remember whether he was paid weekly or semi-monthly?      A. Always paid weekly.

Q. And at any time did you issue any prohibition to Mr. Davis about operating that bulldozer on any other job than the Finch job?

A. No. We usually tell the man we lease the equipment to where it shall or shall not work. [58]

Q. But you issued no prohibition to Mr. Davis?

A. Not that I recall.

Mr. Hart: That is all.

The Court: We will take our morning recess at this time.

(Short recess.)

The Court: Will the witness resume the stand.



(Testimony of Edwin Ferguson)

Q. By Mr. Brewer: This piece of equipment that was involved in the accident was rented to Mr. Finch on an hourly basis—that is, so much an hour for the hours that it was used, isn't that correct, Mr. Ferguson, with a monthly minimum? A. That is right.

Q. 240 hours a month, is that right?

A. 240 or less.

Q. 240 or what? A. Or less.

Q. And then there was certain agreements about a certain amount per hour over 240, isn't that right, \$4.40 an hour? A. 50 per cent of the bare rental value.

Q. 50 per cent of the bare rental value over 240 hours per month? A. That is right.

Q. And it was rented fully operated and maintained by Radich & Brown, isn't that correct? [59]

A. That is correct.

Q. In other words, you made all repairs, maintained the equipment in order and furnished the gasoline and oil? A. That is right.

Q. And didn't the operator send you a report each day of the number of hours and where the work was being done?

A. No, sir. He sent his report once a week.

Q. And that report included where the work was being done and the number of hours on each kind of job, did it not? A. That is correct.

Q. In answer to his Honor's question you said something about you had no knowledge of this being operated on any property except that of Mr. Finch. You knew that it was being operated other than on his own property, didn't you?

A. Not at that time—not until later.

(Testimony of Edwin Ferguson)

Q. Well, he had some of your other equipment for several months prior to that, did he?

A. That is right.

Q. Prior to this accident?

A. Similar equipment, yes, sir.

Q. And then prior to this accident you knew this other equipment was being operated on other pieces of property, didn't you?

A. It was not.

Mr. Girling: Objected to, where the property was being [60] operated as irrelevant, incompetent and immaterial.

The Witness: It was not to my knowledge.

Mr. Girling: And ask it be stricken.

The Court: He said it was not. Do you want that answer stricken?

Mr. Girling: I will abide by the answer. I was trying to stop the conversation. He was answering while I was objecting. I did not even hear his answer. It seemed irrelevant to me and that was the main point I was concentrating on.

Mr. Brewer: That is all.

The Court: May I ask, did you give Mr. Davis any instructions when you hired him?

The Witness: For this particular work?

The Court: Well, not only this particular work, but generally.

The Witness: No. All we do is tell our operators to go on and get on the equipment, and take care of it; give the man a good day's work. If he doesn't he won't stay on the equipment.

Just prior to this he was on another job and on another man's payroll. Then when that job was completed and

(Testimony of Edwin Ferguson)

he went with Mr. Finch we told him he would work under the direction of Mr. Finch in so far as we were concerned, for the land leveling work. And, incidentally, that was the third or fourth piece of equipment that went into that area for land [61] leveling.

The Court: And did you instruct him yourself when this equipment was sent out to Finch's place?

The Witness: I don't recall any special instructions, your Honor.

The Court: How was the equipment delivered to Mr. Finch's place?

The Witness: By a low-bed tractor. I do not recall if it was our own or whether we used one of the—or someone else's.

The Court: Did you cause the equipment to be delivered to Mr. Finch's place?

The Witness: Yes, sir.

The Court: You may proceed.

Mr. Hart: One question.

Q. By Mr. Hart: Mr. Ferguson, you had the exclusive right to fire Mr. Davis, didn't you? No one else could fire him?

A. That privilege—that is right, that privilege remains in the party to whom we release the equipment. If a man does not give a satisfactory day's work they can send the operator in to us.

The Court: And you would send another operator out?

The Witness: Yes, sir. In fact, that has happened many times. A man will go so far as to come on the job drunk. [62] The man will send him in. If we know he is a darn good man we will sober him up.

(Testimony of Edwin Ferguson)

The Court: Sober him up and send another man out in his place?

The Witness: Yes, sir.

Mr. Lillie: May I ask another question, if the Court please?

Redirect Examination.

By Mr. Lillie:

Q. Mr. Ferguson, whenever equipment is moved from one piece of land upon which it is working to another piece of land within a week you would have knowledge of that, would you not?

A. Yes, sir, or 10 days, I will say.

Q. Within 10 days you would have knowledge?

A. He might move Sunday or Monday and we would not know it until the middle of the following week.

Q. And your knowledge would be based on the report of the operator of the equipment?

A. Yes. I might enlarge on that a little. For instance, if a piece of equipment went on the job on the 20th or 25th of the month, at the end of the month we take those daily reports, which are sent in weekly, compile them and invoice the party for the work. Then starting on the first of the month, if we are very busy we may not pay any attention [63] to the tickets until later in the month or maybe the last of the month.

Q. Regardless of paying attention to the report, the report would indicate the equipment had been transferred?

A. A report would be in the office, yes.

Q. As a general rule where such a transfer takes place who do you bill for the use of the equipment?

A. If we make the transfer we invoice the party that we have leased to unless told to invoice someone else.



(Testimony of Edwin Ferguson)

In this case I don't recall any transportation by us whatever from the time we took it to the job.

Q. And your bills went to Mr. Finch?

A. That is correct.

Mr. Brewer: Might I ask another question, your Honor?

Q. By Mr. Brewer: Mr. Ferguson, may I show you this invoice of Radich & Brown and ask you to look at that? Do you recognize that? A. Yes, sir.

Q. And that was prepared by people under your direction there at the office?

A. Yes, sir, from this right here.

Q. From "this right here," you say? A. Yes.

Q. Well, you knew that Mr. Finch's ranch was near Riverside, didn't you? [64]

A. I didn't know that he owned a ranch.

Q. Well, what I am getting at is, you said that you understood it was to be used on his land and that is what I am getting at.

Mr. Girling: Jim, I think he said agricultural work.

The Witness: For agricultural work on any land leveling in that vicinity. We had other equipment working 15 or 20 miles south of there at the same time.

Q. By Mr. Brewer: I thought you intended to say that you understood it was only on Mr. Finch's own ranch or land. A. No, sir.

Q. Then that clears that up. And did you know it was down—transferred down near Palm Springs?

A. Below Palm Springs—17 miles south of Palm Springs.



(Testimony of Edwin Ferguson)

Q. Land leveling is done for the purpose of irrigation work, isn't it, and so forth?

A. Agricultural work, yes.

Q. I mean for the purpose of making lands of a certain level and pitch so that it can be irrigated?

A. That is right.

The Court: I notice here the symbols "PCU" and "BD." What do those symbols mean on the invoice?

The Witness: That is power control unit. "PCU" is power control unit and "BD" is bulldozer blade and "D-8" is tractor. [65] That is 135 horsepower tractor No. 64. That is our own designation.

The Court: What is Radich & Brown truck?

The Witness: That is our low-bed, semi low-bed, truck that hauled it from Burbank to the job and came back.

The Court: Where did Radich & Brown come into the picture?

The Witness: Hauling the tractor to the job.

Q. By Mr. Brewer: They billed them for the cost of transportation to the job.      A. That is right.

Mr. Brewer: We will offer this as our exhibit, your Honor.

Mr. Girling: No objection.

The Clerk: Finch's Exhibit D.

(The document referred to was received in evidence and marked Finch's Exhibit D.)

Mr. Brewer: May I see this little blue slip you had?  
(Document handed to Mr. Brewer.)

Q. By Mr. Brewer: This bill that I have just introduced, Exhibit D, is for the one that is in the account, isn't it, Mr. Ferguson?      A. That is right.

(Testimony of Edwin Ferguson)

The Court: Proceed.

Mr. Brewer: No further questions, your Honor. [66]

Q. By Mr. Girling: Mr. Ferguson, let me have the blue sheet of paper that you had there. As you recall it, Mr. Finch, who had rented other equipment from your company on or about the 20th or 21st of last April, 1944, either was in your office or telephoned to your office and conveyed to your company that he wanted a bulldozer for agricultural work.

A. That is correct.

Q. Now, the agricultural work was to be performed in what neighborhood for the delivery of this equipment?

A. Near Indio—either just slightly north of Indio or south of Indio.

Q. About 17 miles at least from Palm Springs?

A. That is correct.

Q. Now, these tractors or treads on a dozer are such they cannot be operated on public highways without tearing them up?

A. That is correct.

Q. And to move such equipment it is put on what is commonly referred to as a low-bed truck or trailer?

A. Semi trailer.

Q. And your company owns such equipment?

A. That is right.

Q. And did you deliver this dozer to Mr. Finch's designated point for agricultural purposes?

A. Yes, sir. [67]

Q. And hauled it there on your own equipment?

A. That is correct.

Q. A low-bed truck, and you charged for doing that hauling and delivering the equipment to him?

A. That is right.

(Testimony of Edwin Ferguson)

Q. And Mr. Finch's Exhibit D is the bill for that hauling?      A. That is correct.

Q. From Burbank to where he asked that it be delivered?      A. That is correct?

Q. Now, when you rent such equipment with a man who operates it, such as Mr. Davis in this instance, you rent it completely operated and gased and oiled?

A. That is correct.

Q. Just like a uniformed man at a hotel door?

The Court: That is already in the record. I understood what he meant when he gave his testimony.

Q. By Mr. Girling: And when you have so done and so delivered the man and the bulldozer, what control or direction, if any, on that job do you ever give that man?

Mr. Lillie: I will object to that, if the Court please. That would be a conclusion of this witness and that is one of the points to be determined.

The Court: He can ask what direction he gave to Davis.

Q. By Mr. Girling: What control or direction of Davis [68] did you have—did you tell him what he was to level down there and how to go about leveling it or anything?

A. No, sir. He is supposed to be under the direction of Mr. Finch.

Q. And under these operations do you exercise control of what the man is to do or how he is to do it?

Mr. Sims: I object to that as calling for a conclusion of the witness.

(Testimony of Edwin Ferguson)

Q. By Mr. Girling: Have you ever done it in the course of your work? Do you do it?

A. I would say no.

The Court: Counsel, isn't this the gist of it? When they send out a piece of equipment with an operator doesn't that have a dual effect? Don't they in a sense warrant the equipment as being capable of doing the work and also when they furnish an operator they warrant they are sending a capable operator?

Mr. Girling: I am attempting to prove they do not exercise control of the man and form in which the work is done, which in my interpretation of the law is the necessary thing that they must prove to bind my client. Control is the test.

The Court: I think it is reasonable to assume when a tractor or bulldozer is sent out, the man to whom it is sent will say, "Well, I want this high ground cut down and this low spot filled up." To that extent he would have direction [69] of him and supervision of the work.

Mr. Girling: In other words, who controls the man on the tractor, the fellow in Burbank or Finch, out on the agricultural land.

The Court: Well, that is a question that I am going to have to determine eventually.

Mr. Girling: That is what I was trying to help the Court in.

The Court: I will ask the witness: Isn't it true when a man goes out on a job you do not supervise the job?

The Witness: No, sir.

The Court: So that the man that is having the work done supervises the type of work that he is to do?

(Testimony of Edwin Ferguson)

The Witness: That is correct.

The Court: And your operator is supposed to be able to operate that machine so as to accomplish the purposes the party has hired him for?

The Witness: That is right.

Q. By Mr. Girling: And from the time the operator leaves you to go on the job does your company give the operator any orders?

A. Seldom, if any; none as to the operation.

Q. Did you give Davis any orders after he went onto this job?      A. None at all. [70]

Q. Now, you have testified in answer to one of counsel's questions that you require from the person who rents from you such equipment notification of any change in that equipment's use because, as I understood you to say, rates of insurance vary as to the type of work on which the equipment is being used. You so testified, as I recall.

The Court: What insurance are you referring to?

Mr. Girling: Insurance on the equipment.

Q. By Mr. Girling: You do carry insurance on equipment?      A. That is correct.

Q. And does the rate—

The Court: Does that mean the equipment itself for public liability?

The Witness: Public liability and property damage I believe is what he is trying to arrive at, your Honor. Our interest in that, I might say, is this: on land leveling work with very little danger connected we might keep our PLPD policy at 10 to 25 to 50, but if we went on certain underground work, such as conduit, telephone conduit or maybe Army airport, we would want



(Testimony of Edwin Ferguson)

additional insurance during the course of that operation. In fact, only recently on certain work of that type we were forced to give them a policy of one hundred to two hundred thousand dollars. Would not accept anything less owing to the hazardous conditions existing. [71]

Q. By Mr. Girling: Was that another airport?

A. No. It was telephone conduit.

The Court: Do you base your rates upon the type of work being done?

The Witness: Base the amount of insurance we would carry.

The Court: And that varies your rate?

The Witness: No, it would not change the rate. The state of California sets the rate per \$100,000 of payroll, but if we are on work where there is very little danger it stands to reason we would not pay \$100,000 or \$200,000 premium on a policy.

The Court: But your rates on the rental would not vary?

The Witness: Oh, no, no.

The Court: As I understand it, your rates on this were fixed by OPA.

The Witness: The rental rates, yes, sir. They are not always used. I might add, incidentally, there is nothing to prohibit you from renting for less than the established maximum rates. Those are maximum rates. I believe the word "minimum" was injected a moment ago, which I did not take exception to.

The Court: Your maximum rate is what you look to?

The Witness: That is right.

Mr. Girling: I may have copied this down wrong. There [72] was something occurring at the time, but I

(Testimony of Edwin Ferguson)

understood you to say Mr. Finch, in the event Mr. Davis had proved unsatisfactory, could have sent Davis on back and said he wanted another operator?

A. Yes, sir. Anyone to whom we lease equipment has that privilege if the man is unsatisfactory.

Q. So that on the particular job, then, the renter, the person to whom the property is rented, has that right, in addition to showing the man what to do and if he is not satisfactory telling you to get another man?

A. In this particular case, why, I don't believe we were known to each other. I don't get just your point. I am finished when I let Mr. Finch have the equipment.

Q. Well, if Davis had not been satisfactory—

A. Mr. Finch could have sent him in.

The Court: He could not have substituted his own operator, though?

The Witness: He could have with our permission, but rarely do we ever permit it unless we know the operator and know he is a good operator. If we knew that we would say, "Yes, go ahead."

Q. By Mr. Girling: What is the difference in rating on agricultural work as distinguished from work on an Army airport on coverage for equipment of this type?

A. I would have to get insurance policies. Mostly the [73] coverage you would carry, the amount of coverage you would carry—if you are paying, for sake of argument, \$1.16 on \$25,000 limit as compared with the same amount on \$100,000 or \$200,000 limit, that is your cost. That is what we try to prevent, is carrying a high PLPD policy when it is unnecessary.

Q. It would be higher for airport work than it would for agricultural work?

(Testimony of Edwin Ferguson)

A. The amount carried, yes. Cost us more money.

Q. Now, do you know who it was paid for the use of this equipment after the time it left your place?

A. Mr. Finch.

Q. Didn't Mr. Wilcox ever pay you for it?

A. No, sir.

Q. Didn't Mr. Roeder ever pay you for it?

A. No, sir. The invoices will be in this afternoon to substantiate that.

Q. I am showing you what appears to be a blue sheet of paper with Radich & Brown printed on it and ask you if you are familiar with what that document is.

A. Yes. That is a rental record and shipment of tractor to Galen B. Finch from us, whose residence address is San Bernardino.

Q. It bears the date of what in the upper right-hand corner? [74]

A. Evidently left our yard on the 21st to go to work on the 22nd of April 1944.

The Court: What is the date of the accident in this case?

Mr. Lillie: May 2, 1944.

The Witness: This was used, if I might continue, from this date to the last day of the same month, April, at which time an invoice was made for this land leveling.

Q. By Mr. Girling: So between the time this particular instrument I hold in my hand, the blue sheet, was made and until May, the next month, there would be no invoice made and, as far as your records would be con-

(Testimony of Edwin Ferguson)

cerned, this would be the way it would be carried upon this particular record?

A. There is an invoice from that date until the last day in that month for land leveling work. Then at the end of May the tickets were gathered and another invoice made.

Q. Now, we do not have the other invoices here at the moment, Mr. Ferguson, but have you any independent recollection whether those invoices were ever made to Mr. Wilcox or to Mr. Roeder or anyone else except Mr. Finch?

A. They were made to Mr. Finch.

Q. At all times?

A. They will be here a little after 1:00 o'clock.

Mr. Girling: I would like to offer this in evidence as [75] the Radich & Brown Exhibit No. E.

The Court: It may be so marked.

(The document referred to was received in evidence and marked Radich & Brown Exhibit E.)

Q. By Mr. Girling: When did you first hear of this accident to the airplane?

A. I cannot give you a date. As I recall it was reported to me a couple of days after the accident.

The Court: By whom?

The Witness: Your Honor, I do not recall. I do not remember whether I made a note on my record to that effect or not—whether it was Finch or our own insurance company. I heard from our insurance company. I doubt if I made a record of that.

Q. By Mr. Girling: And from the time this particular piece of equipment, this bulldozer, and so forth, was sent out of your yard in Burbank to Mr. Finch at the



(Testimony of Edwin Ferguson)

place 17 miles below Palm Springs until you received notice of this accident, did you know that it was being operated upon any other project than Mr. Finch's own agricultural property?      A. No, sir.

Q. Did you know that it had gone to the Army airport at Palm Springs?      A. No, sir.

Q. Did you know that Mr. Wilcox had or did use it at [76] the airport at Palm Springs?

A. Not before the accident, no, sir.

Q. Before the accident did you know that Mr. Roeder had used it at Palm Springs?

A. Never heard of the man.

Q. Had you given Mr. Davis any direction to take that equipment, to accompany it anywhere other than upon the Finch job?      A. No, sir.

Mr. Girling: That is all at this time, your Honor.

The Court: When did you first see Davis after the accident?

The Witness: I cannot say whether I saw him during the entire month of May or not. We have operators that will not come into the office for weeks and weeks. They will mail their time cards in.

The Court: After the accident did Mr. Davis continue to work for your company?

The Witness: Oh, yes. In fact, they stated the accident was on the 2nd and, if I am not mistaken, we made a complete month of May rental—our invoice will show that when we bring it in. If I recall correctly, it went back to land leveling again later in the month after leaving the airport. Those daily tickets will show that.

The Court: Then just what instructions do you give your [77] operator when you send him out to do a land



(Testimony of Edwin Ferguson)

leveling job? Your operator knew at the time he went out what he was supposed to do, did he not?

The Witness: Yes, sir. I believe he had a copy of the tickets or saw the transportation ticket showing what he was to do. It stated on the ticket it was for clearing and leveling land.

The Court: Then when he took it to the airport he was disregarding your instructions?

The Witness: I don't see—I don't believe he would be disregarding the instructions. I don't think we gave him instructions from there on. His instruction was to start clearing and leveling land for Mr. Finch and we assumed that would be what he would be doing, the same as the others had been doing who were in that section for several months.

The Court: But after you learned this equipment was moved over to the airport then he was doing work differently from that for which it was hired to do, according to your statement, isn't that true?

A. That is different work from what it was hired to do, yes, sir.

The Court: And it was doing different work and your operator was handling the bulldozer?

The Witness: Not under our direction, your Honor.

The Court: But he was your operator? [78]

The Witness: That is right.

The Court: And that equipment could not be used unless your operator was on it, could it?

The Witness: That is right.

The Court: That is all.

Mr. Lillie: That is all, Mr. Ferguson.

Mr. Fraser: Just one question.

(Testimony of Edwin Ferguson)

Q. By Mr. Fraser: Mr. Ferguson, do you know just how long this bulldozer was used on this particular job after the accident? You may have answered it before but I did not hear you.

A. No, I don't. You could find out from the records that are coming in after lunch. They will show.

Q. Do you know whether it worked several days on that after that particular job?

A. I don't recall how many days it worked, no, sir.

Q. Do you recall what his hourly wage was or was it a straight weekly basis?

A. Our rate was, as I explained before, to Mr. Finch, at a maximum rate for the bear rental plus the hourly operation and maintenance and plus any overtime as required by the union. We know of no rate beyond that in this case.

Q. At no time did you transfer the actual possession of that machine to any other parties besides your employee, Mr. Davis?

A. Transferred the possession? [79]

Q. Possession.

A. We did not authorize any transfer of possession.

Q. In other words, Mr. Davis, the operator, had possession of it at all times?

A. Under the direction of Mr. Finch, yes, sir.

Q. I think you answered this, but he could not transfer the driver to another machine and put one of his own on without your consent?

The Court: That has been asked and answered several times.

Mr. Fraser: That is all.

Mr. Lillie: Call Mr. Goodine. If the Court please, this witness is working on an emergency job and as soon as possible he would like to be excused.

The Court: Very well.

HENRY F. GOODINE,

called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Lillie:

Q. What is your residence, Mr. Goodine?

A. At the time of the accident or now?

Q. As of now.

A. 9537 Hunt Avenue, South Gate.

Q. What is your occupation? [80]

A. Superintendent.

Q. Superintendent of what?

A. Jack Wilcox Construction Company.

Q. Are you employed now?      A. That is right.

Q. Were you employed in that capacity on May 2, 1944?      A. That is right.

Q. Do you recall the accident in question?

A. Do I recall it? Yes.

Q. Did Mr. Roeder make arrangements with you for the rental of this bulldozer?      A. That is right.

Q. Prior to the second day of May?

A. I believe it was on the second day of May.

Q. Did you have a conversation with Mr. Roeder?

A. Yes, sir.

(Testimony of Henry F. Goodine)

Q. Was there anyone else present?

A. I could not answer that.

Q. You don't know?

A. I don't know whether there was or not.

Q. Do you know whether the conversation took place?

A. It took place on the site—the site of the construction.

Q. Will you tell us what the substance of that conversation was? [81]

A. Well, Mr. Roeder approached me and asked me if it was possible that he could use the dozer for a short period of time to do some leveling for his work, which I don't remember just what it amounted to now, without checking the invoices and that was about all the conversation was otherwise, and I said, "Yes."

Q. Did he make arrangements for the time at which the work was to be done?

A. Well, roughly, he said it would probably take an hour or hour and a half or something like that.

Q. Then did you proceed to give instructions to the operator in respect to taking the equipment over to the job?

A. Yes, sir. I told the operator that he was to go over on Mr. Roeder's job and do whatever Mr. Roeder wanted him to do under his supervision.

Q. Did you accompany him over there?

A. We planked across the runway for him to get across and that was all.

Q. Did anybody assist you in this planking?

A. My men did it. If I remember correctly, I believe one of his men helped to plank across there.

(Testimony of Henry F. Goodine)

Q. Then you arrived at the place that the work was to be performed at the same time the bulldozer did, isn't that correct?

A. You mean that I arrived there? [82]

Q. Yes. Did you leave your planking and go over to where the bulldozer was?

A. No, I did not—not myself.

Q. Where did you go after the machine was planked across the strip?

A. Well, I went on about my own duties—my own type of work.

Q. Did you instruct the bulldozer driver, Mr. Davis, as to what he was to do?      A. I did not.

Q. Did you give him any directions at all?

A. No. Otherwise I told him that, "You go over and do whatever Mr. Roeder wants you to do and when you get through you are to come back on my work."

Q. Do you know how long the job took?

A. Offhand I could not say. It was a short period of time. I could not say exactly. I would say probably, oh, 45 minutes to an hour. Somewhere in that neighborhood.

Q. Thereafter did you ever rent the bulldozer to Mr. Roeder again?

A. I believe that—it seems like he had it for another short period of time to do the back filling with.

Q. How long was that?

A. I would not recall that now.

Q. Do you have any idea how many days or hours it was? [83]

A. It was a short period. I would say probably an hour's time or something like that.



(Testimony of Henry F. Goodine)

Q. The same day? A. I could not answer that.

Q. Were you present at the time the bulldozer was rented from Davis & Myers by Mr. Wilcox?

A. Will you repeat that, please?

Mr. Lillie: Will you read the question.

(Question read.)

The Witness: I was not present, no. In fact, I rented the bulldozer over the telephone.

Q. By Mr. Lillie: You rented the bulldozer yourself personally?

A. For Mr. Wilcox.

Q. What date was that?

A. I could not recall that. The invoices would have to show that. I couldn't recall it. It would be prior to the accident.

Q. Who did you call?

A. Mr. Davis at San Bernardino.

Q. Did you have a conversation with him in respect to it? A. That is right.

Q. What was the substance of that conversation?

A. Otherwise I understood that—I understood he had [84] a bulldozer working in that vicinity and if there was a possible chance to rent that dozer—and I don't remember whether he called me back or whether we settled it under that one conversation or not, but it seems to me like we did settle it under the one conversation, or we was to meet down there or something. I would not say for sure just what that was, but it was one way or the other. We were either to make an appointment and meet and have the understanding; but he was pretty sure we could make arrangements to get the dozer.

(Testimony of Henry F. Goodine)

Q. How was the dozer brought over to the Palm Springs Army airfield?      A. Under its own power.

Q. Did you instruct the operator to come over?

A. No.

Q. Do you know who did?      A. No.

Q. Did you make any arrangement as to the terms for the rental of this bulldozer?

A. As to the terms?

Q. Yes.

A. Otherwise than the regular rates as shown in the invoices.

Q. And was that operated, equipped and maintained?

A. Fully operated.

Mr. Lillie: That is all. [85]

#### Cross-Examination

By Mr. Brewer:

Q. Mr. Goodine, did Mr. Davis tell you that?

Mr. Girling: Which Mr. Davis is that?

Mr. Brewer: Otto Davis.

The Witness: Not the driver.

Q. By Mr. Brewer: No, the one you talked to on the telephone. Did he tell you in that telephone conversation or any other time that he had an agreement with Mr. Finch not to use the equipment on any new job unless Mr. Finch or his representative, Mr. Stover, had okayed it first?      A. He did not.

Q. Did you see Mr. Otto Davis in Indio before the tractor came over there?      A. I believe not.

The Court: How long had you had the tractor before this accident?

(Testimony of Henry F. Goodine)

The Witness: A very few days. I do not recall. Maybe three days or something like that. Somewhere in that vicinity. It could have been four.

The Court: Did you know who owned the tractor?

The Witness: Yes. I knew that Radich & Brown owned the tractor.

The Court: How did you know that?

The Witness: Well, just through Mr. Davis and myself. [86]

The Court: You mean the operator?

The Witness: No, Mr. Davis, the contractor that had it in his possession at the time.

The Court: That is all.

Q. By Mr. Brewer: Mr. Goodine, what kind of work did you do there with this equipment?

A. Cutting and filling—leveling land.

Q. On the airport itself?

A. On the airport itself.

Mr. Brewer: That is all.

The Court: Did you have a subcontract to do the job?

The Witness: That is right.

Q. By Mr. Brewer: You did not have a written contract with Davis & Myers, did you, for the rental of this equipment? It was just the telephone conversation?

A. That is right.

Mr. Brewer: That is all.

Q. By Mr. Hart: Mr. Goodine, were you known as "Hank" on this job? A. That is right.

The Court: Where did you get that name?

The Witness: From "Henry."

(Testimony of Henry F. Goodine)

Q. By Mr. Hart: When you rented this equipment from Mr. Davis was there any understanding with reference to the right to fire the operator? [87]

A. No, there was no conversation to that.

Q. What was your understanding?

The Court: It is not a question of whether he understood it. It is what happened that is important.

Q. By Mr. Hart: Now, when you had this conversation with Mr. Roeder that you testified to and you said that you told Mr. Roeder that he could rent the equipment and that it would be under his supervision, what did Mr. Roeder say with reference to that point?

A. Well, there was nothing said otherwise he accepted it. He accepted it and that is all there was to it.

Q. And did you tell the operator Davis that he would look to Mr. Roeder for his instructions?

A. That is right.

Mr. Hart: That is all.

Q. By Mr. Brewer: Could I ask another question? Before the accident did you tell Otto Davis of Davis & Myers that you were going to loan or rent this equipment to Roeder?

A. Which Davis is that? The operator?

Q. No, that is not the operator.

The Court: Otto Davis?

The Witness: No, sir.

Mr. Brewer: That is all.

Q. By Mr. Girling: Now, as I understand it, there was a concern known or there is a concern known as Davis & Myers. [88]

A. That is right.

(Testimony of Henry F. Goodine)

Q. And Davis' given name is Otto Davis as distinguished from Davis who was running the bulldozer. They were two separate people? A. Yes.

Q. And you in your work as superintendent had been, I take it, at the airbase for some time and decided in the course of your work it was necessary to use a bulldozer and you got in touch with Otto Davis about renting a bulldozer from him? A. That is right.

Q. Did he tell you whose bulldozer it was or where he got it? A. No.

Q. And you never knew? A. I didn't know.

The Court: You mean at the time of the rental?

The Witness: At the time of the rental, that is right.

The Court: But you did afterwards?

The Witness: Afterwards, yes.

Q. By Mr. Girling: After the accident?

A. No, I would say before the accident.

Q. How long before?

A. Oh, a couple of days. I knew it was Radich & Brown's equipment by the operator. [89]

Q. He told you he was working for them?

A. Yes, sir.

Q. That he was a Radich & Brown man?

A. Yes, sir.

Q. And a Radich & Brown dozer? A. Yes, sir.

Q. By the way, how many days was this bulldozer on the airport before the accident happened?

A. I would say possibly, oh, maybe three days, two days, three days. Along in there.

Q. In other words, the accident happened at the end of the second or third days? A. (No answer.)



(Testimony of Henry F. Goodine)

Q. Did you tell Otto Davis how much you were going to pay him for the use of this bulldozer?      A. No.

Q. You expected to pay him, didn't you?

A. I expected to pay him the OPA rate, the customary rate.

Q. And were those rates discussed in money or amount of money at all?

A. I don't recall whether they was at that time or not.

Q. Did you or your company ever pay Davis for the rental of the equipment?      A. That is right. [90]

Q. And do you recall how much your company paid Mr. Otto Davis for renting this equipment from him?

A. You mean per hour?

Q. Either by the hour or totally—the total time you had it.

A. I can't recall that. The invoices would show that.

Q. Are the invoices here in court?

A. I couldn't say.

Q. If they are not could we have them here by 1:30?

A. It would be doubtful.

Q. Could we have them here this afternoon?

Mr. Hart: We have one of them here.

Mr. Girling: That might help me.

Q. By Mr. Girling: Are you familiar with that?

A. That is right.

Q. What is it, anyway? Let us give it a name.

A. Well, it is an invoice to Mr. Roeder for two hours' work, fully maintained for a bulldozer.

Q. Now, does that indicate you were paying Roeder or Roeder was going to pay you?

A. Roeder was to pay us.

(Testimony of Henry F. Goodine)

Q. And it bears the date in the upper right-hand corner, on the right-hand side of 6-24-44, and as I understand the instrument, then, it is a bill or invoice from your principal, Jack Wilcox, to Walter Roeder and charging Walter [91] Roeder for the Stratton Construction Company work at the maintenance hangar building at the Army airfield in Palm Springs for bulldozer rental, two hours, at \$15 an hour—total \$30.

A. That is right.

Q. And if the money was paid, the \$30, by Roeder, that would be paid to Wilcox?

A. That is correct.

Mr. Girling: I offer this in evidence as Defendant Radich & Brown exhibit next in order.

The Court: It will be so marked.

(The document referred to was received in evidence and marked Radich & Brown Exhibit F.)

Q. By Mr. Girling: So far as you people did any of—did you people ever pay—I mean you or your principal or Roeder, if you know, ever pay Radich & Brown anything for the use of this dozer?

A. They did not.

Q. They did not?

A. Did not, no, sir.

Q. You have said there was no written contract between you and Otto Davis of Davis & Myers for the rental of it—it was merely a telephone conversation?

A. As far as I know, yes, that is correct.

Q. Did you solicit the rental of the dozer or did he [92] approach you as one who had a dozer to rent?

A. I approached him.

Q. Were you acquainted with Mr. Finch?

A. No, I was not.

(Testimony of Henry F. Goodine)

Q. Did you ever pay Mr. Finch, as far as you know, any rental for this dozer?

A. That is correct as far as I know.

Q. You did?            A. That is right.

Q. Now, who told you to pay Finch?

A. Who told me to pay Finch?

Q. Yes.            A. Mr. Wilcox.

Q. That is your boss?            A. That is right.

Q. Well, as far as you know, where did Wilcox get any information that he should pay Finch?

A. Through me.

Q. Through you?            A. That is right.

Q. And how did you acquire that information that Finch was to be paid?

A. In the first place, I had Mr. Finch's equipment rented there and I okayed all the daily work time sheets. I signed them and at the time of the invoicing I okayed the [93] invoices in comparison to the daily work tickets.

Q. So that was how you knew that Finch should be paid?            A. That is right.

The Court: Gentlemen, if this equipment all the way along the line was passing through so many hands at the OPA ceiling price who made any money out of the deal?

Mr. Girling: There should be another count in the indictment to determine that. It is not in issue.

The Court: I am simply curious as to who made a profit. It may not have anything to do with the issues here.

Mr. Girling: I have a good guess.

Mr. Lillie: I think I can tell you, if the Court please. At the time in question the equipment was very difficult to get. It was at a premium. So that, out of deference

(Testimony of Henry F. Goodine)

to leaving equipment idle, each man attempted to gain possession of the equipment. Each one paid the other. Radich & Brown were the only ones who profited by it, by reason of the fact they rented the equipment originally. Mr. Wilcox paid Gallen B. Finch the OPA maximum.

The Court: Everybody was paying each other the ceiling price. I was wondering where the profit was.

Mr. Lillie: There was no profit.

Mr. Girling: I can cut the knot for your Honor by Mr. Ferguson resuming the stand. He says he can explain it. I can't. [94]

The Court: I do not know that it is necessary to the case. I was just curious in that respect.

Mr. Ferguson: Would I be out of order if I answered your question?

The Court: You may have an opportunity to do that after lunch.

Mr. Brewer: I would like to ask this gentleman another question from the evidence that has just been developed. Are you through?

Mr. Girling: Yes.

Q. By Mr. Brewer: After the accident did you talk to Mr. Stover here, who was a representative of Mr. Finch, about the equipment? A. In what respect?

Q. Well, didn't he come over and tell you that he didn't know the equipment was there and it wasn't supposed to be moved on the airport for work?

A. It seems to me I recall something to that effect.

Q. And he wanted to take it back to the job where it was on agricultural work and then you talked him into leaving it there for a few days, isn't that correct?

A. I believe that is correct.



(Testimony of Henry F. Goodine)

Q. And he told you at that time that he didn't know where it was and it had only been authorized to do agricultural work—it had only been limited to do agricultural [95] work such as the jobs it did for Mr. Finch and when it left Mr. Finch it had to be okayed?

A. Well, the conditions didn't go that far. It was just a matter of him telling me that he didn't know where the equipment was at the time and he had come up to see if he couldn't get the equipment back onto their work and I had a few more days to do and I asked him if it was possible for us to hold it there. It was an emergency job and that was the agreement, for it to remain and finish the job.

Q. The accident had already occurred at the time, hadn't it?

A. I can't recall that, whether that was before or after. I would not say for sure.

Mr. Brewer: That is all.

Mr. Fraser: Just one question.

Q. By Mr. Fraser: Mr. Goodine, I think you testified here this morning when Mr. Roeder called upon you he had asked for the use of the equipment and you told the driver he should go over and do whatever Mr. Roeder wished, is that correct? A. That is correct.

Q. Do you remember on the 9th day of May, 1944, giving an affidavit before Captain Dunn of the airport?

A. That is right.

Q. And that was given just a week after the accident, [96] on the 9th of May?

A. I don't remember the date.

Q. I call your attention to this statement: "On the morning of the 2nd of May, 1944, Walter Roeder con-



(Testimony of Henry F. Goodine)

tacted me requesting that we level the terrain along the water pipe site for him. I in turn told Mr. Clarence A. Davis, the operator of said equipment, that he would do the leveling for Roeder. I assisted Jesse M. Cox in planking the tractor and bulldozer across the paved taxi strip.” A. I remember that.

Mr. Fraser: I offer this in evidence.

The Court: Is it admissible in evidence? He admitted making the statement. It is in evidence now.

Q. By Mr. Fraser: Do you remember making any daily or weekly reports as to the time that Davis worked on the tractor or worked for you on the job?

A. Will you repeat that, please?

Mr. Fraser: Will you read the question.

(Question read.) A. To whom?

Q. I said any reports setting forth his time and his wages.

A. Well, there were no reports that was made by me to him otherwise than at the time of the beginning of the work of a morning and quitting at night. As far as wages goes, [97] that was never discussed.

Q. Who do you make, or—do you make a weekly report of the payrolls to the United States Engineer?

A. That is correct.

Q. On the job? A. That is right.

Q. Was this Clarence Davis' name ever on that payroll? A. On my payroll?

Q. Yes.

A. Not as I recall. I would have to check that. It could be. I would not recall that.

(Testimony of Henry F. Goodine)

Q. Were you bringing in some other papers this afternoon, and if you are can you bring those sheets in too?

A. I am afraid I could not get to it this afternoon.

Q. Isn't it a fact that on the payroll from the 2nd of May to May 8th you reported to the United States Engineer's office, under affidavit, that he worked seven hours for you as a tractor operator at \$1.50 an hour?

A. I can't recall that.

Q. Do you recall any of those reports?

A. No. The only thing I would have to go by would be to go through the general routine to check that.

Mr. Fraser: That is all.

The Court: Any other questions?

Q. By Mr. Bedford: Mr. Goodine, do you recall any- [98] thing of the conversation you had with Mr. Otto Davis at the time you called him to ask him if you could obtain the use of this equipment?

A. Mr. Otto Davis—

Q. Davis & Myers.

A. Otherwise than just the prearrangements for it.

Q. Do you remember him asking you how long you would need the equipment?

A. I believe that was discussed.

Q. And do you remember him asking you what job you were using it on?      A. Yes.

Q. And what did you inform him as to those two matters?

A. I told him at the Palm Springs airport.

Q. You told him that you were grading for a hangar, did you not?      A. That is right.

(Testimony of Henry F. Goodine)

Q. And how long a time did you tell him you would need this dozer?

A. Well, I told him it was for a short period of time. I don't recall whether I stated in days or not.

Q. And do you recall that he told you at that time that he could not tell you that you could have the equipment until after he had talked with the people for whom it was working at that time? [99]

A. I don't recall as to whether that conversation was had, but it seems to me like that I was to check with him in a short time. He was either to call me or I was to meet him. Now, I don't remember that.

Q. In other words, he was not anxious to let the equipment go?

The Court: That is immaterial, whether he was anxious or not. Let us find out what arrangements were made.

Q. By Mr. Bedford: As a matter of fact, he let you have it for that one job, did he not?

A. That is correct.

Q. And to refresh your memory further, isn't it true that you met him the next morning bringing the equipment down to your job? A. That is correct.

Q. And that was the job where the leveling of the spot for the hangar that Wilcox had?

A. That is right.

Q. Do you recall telling him that you would not need it over any certain length of time?

A. Not definitely.

Q. And do you recall how long you did have the equipment there?

A. Well, roughly, I would say, possibly—no, I would have to check the invoices to answer that. [100]

(Testimony of Henry F. Goodine)

Q. But you do recall that Finch was the one that was paid for the use of this equipment, do you not?

A. That is correct.

Q. And no money was ever paid to Davis & Myers?

A. I would have to check the invoices on that to make sure.

Q. Can you have those here this afternoon?

A. Maybe Mr. Hart has an invoice there. I do not know.

The Court: Gentlemen, it is after 12:00 o'clock and at this time we will take a recess until 1:30. All witnesses are directed to return at that time.

(Whereupon, at 12:10 o'clock p. m., a recess was had until 1:30 o'clock p. m. of the same day.) [101]

Los Angeles, California

November 23, 1945

1:30 o'Clock p. m.

The Court: You may proceed, gentlemen.

Mr. Bedford: I am through with the witness.

Mr. Fraser: Just one more question.

HENRY F. GOODINE,

the witness on the stand at the time of recess, having been previously duly sworn, resumed the stand and testified further as follows:

Cross-Examination (Resumed)

By Mr. Fraser:

Q. That bill for \$30, did that include just the work for that one day?      A. Just for the two hours.

(Testimony of Henry F. Goodine)

Q. Was that all done in the one day?

A. No, different intervals.

Q. How much was done on the Roeder job at the time of the accident?

A. Oh, I would say possibly half of it—45 minutes to an hour.

Q. And then at a subsequent date or a few days afterwards the equipment was used again?

A. That is correct.

Q. And that completes the two hours?

A. That is right. [102]

Q. And that bill was paid to you by Roeder, paid to Jack Wilcox?

A. Jack Wilcox.

Mr. Fraser: That is all.

Q. By Mr. Girling: Mr. Goodine, while you were out over the noon recess did you come across any more invoices or bills?

A. No, I did not.

Q. That is the only one available in court so far as you know at the present time?

A. That is right.

Mr. Girling: That is all.

The Court: Any further questions, gentlemen?

Mr. Lillie: If the Court please, before the Government rests I would like to make a motion to amend the second amended complaint by interlineation so as to conform to the proof and that will be another sentence added in paragraph 5 on page 3, and it is that subsequent to the aforesaid line 31, which ends "Clarence A. Davis, Operator."

The Court: Is that paragraph 6?



Mr. Lillie: Paragraph 5. It will be a continuation of paragraph 5.

The Court: Is there more than one cross-complaint? You mean Government's cross-complaint?

Mr. Lillie: Yes. [103]

The Court: On page 3, and what line?

Mr. Lillie: It will be a continuation of line 31.

The Court: Yes.

Mr. Lillie: That "subsequent to the aforesaid leases and prior to the 2nd day of May, 1944, cross-defendant Jack Wilcox entered into an agreement with cross-defendant Walter Roeder to lease or rent to Walter Roeder the aforesaid bulldozer-tractor with Clarence A. Davis as operator."

The Court: I think the Court has authority to allow an amendment to conform to the proof. It cannot be amended by interlineation but it can be a subsequent order to conform to the proof.

Mr. Lillie: Thank you, your Honor.

The Court: Does the Government rest?

Mr. Lillie: Government rests.

The Court: Gentlemen, let us proceed and hear the rest of the story.

Mr. Brewer: I have a couple of witnesses whom I will be glad to put on the stand at this time.

My client is Gallen B. Finch, who rented this equipment from Radich & Brown. Will you come forward, Mr. Finch?

GALLEN B. FINCH,

called as a witness on his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your full name. [104]

The Witness: Gallen B. Finch.

Direct Examination.

By Mr. Brewer:

Q. Where do you live, sir?

A. San Bernardino.

Q. In the early part of 1944, March or April, did you rent some equipment from Radich & Brown?

A. I did.

Q. And how was that rental arranged for? By what method? Do you have a written contract or was it an oral agreement?

A. Just an oral agreement.

Q. Oral agreement? A. Yes.

Q. Who did you talk to about it?

A. Mr. Ferguson of Radich & Brown.

Q. Just what was the substance of the conversation so far as the rental of the equipment was concerned?

A. Well, I rented different sizes of tractors but this particular tractor was based on so much an hour fully maintained and operated.

Q. And was there any understanding between you and them that it was to be used on agricultural work?

A. There was.

Q. And then did you use that on agricultural work?  
[105] A. I did.

Q. And with reference to this particular one that was involved in the accident, you know which one that is, of course? A. Yes, sir.

(Testimony of Gallen B. Finch)

Q. Now, were you in the state at the time this accident occurred on May 2nd? A. I was not.

Q. When did you leave?

A. On the 25th of April.

Q. Where did you go? A. New York City.

Q. And when you left did you leave anyone in charge of this equipment in your place? A. I did.

Q. And who was that? A. Joe Stover.

Q. Now, then, with reference to this equipment and other equipment you had, did you rent that to Davis & Myers? A. I did. •

Q. They were a partnership, were they?

A. No. They were just operating. They were a partnership. There was a partnership between Davis & Myers.

Q. That is what I mean. And that was Otto Davis, the cross-defendant? [106] A. And Mel Myers.

Q. And they are from San Bernardino to?

A. Mr. Otto Davis is from San Bernardino, yes.

Q. Now, subsequently to the rental of that equipment to them and before this accident occurred, did you have any discussions with them with reference to where the equipment was to be used and on what kind of jobs?

A. I did.

Q. Well, can you remember when the first discussion was had with him?

A. It was along in April, the first talk was around the 15th of April.

Q. And where did that take place?

A. Took place on the Palm Springs and Indio highway.

(Testimony of Gallen B. Finch)

Q. And who was present besides yourself?

A. I think Joe Stover and Mel Myers and Mr. Otto Davis.

Q. Will you state the substance of the conversation with reference to that subject matter? A. Yes, sir.

Mr. Bedford: What was the date of that?

Mr. Brewer: April 15th.

Mr. Girling: That was before the dozer was rented.

Mr. Brewer: It relates to all of the equipment.

The Witness: We had some trouble with the farmers otherwise. Mr. Davis and Mr. Myers would go in and talk to a [107] farmer and get a job of leveling his land and the operator would move on and after the job was done and the time to pay came along and then there was a question about it. Davis & Myers told the farmer there would only be 10 or 12 hours or so many hours of work on the particular job and they would not pay over that. So I told Mr. Myers and Mr. Davis that after this before they moved any tractors to any job to tell me where they were going to move it so I could go and talk to the farmer and have it understood so that there would not be no quarrels on the time payment. Otherwise we was working by the hour and not contract and that we could not tell a farmer that it was going to take 15 or 20 hours to level a 10-acre field or going to take three or four days. We were supposed to do the surveying and driving stakes and we were doing the leveling for them by the hour. They were doing the staking and surveying.

Of course in getting these jobs all the farmers would ask them for an estimate as to how many days it would take. Of course it was hard for them to estimate how

(Testimony of Gallen B. Finch)

many days but probably they did say two or three days and maybe some of these jobs would take five or six days and then we would go and hand a farmer a bill for it and he would kick on it and he would say, "I thought it was going to take only 30 hours." That is why the discussion came up on the 15th—so they would not move the machinery to any other job unless I was [108] notified or Mr. Stover, and we could go to the farmer where this machinery would be operated, because Radich & Brown was holding me for the payments and I wanted to know about it—I wanted to be sure I was going to get my money.

Q. By Mr. Brewer: Did Mr. Davis or Mr. Myers or either or both of them agree to that?

A. They did.

Q. And did you ever have any subsequent discussion with them on the same subject matter?

A. No, I didn't. I don't think so, any more than that day.

Q. And from then on did they follow out that pattern of calling you in for the jobs?

A. They did.

Q. And then you would go and talk to the farmer?

A. I did.

Q. Up to the time of the accident so far as you know that was followed out?

A. That is right.

The Court: Where do you come into the picture? Renting this equipment and then letting somebody else have it? Was there any reason for that? What was the purpose of subletting it? You rented it to do certain farm work?

The Witness: I had a tractor of my own that I had rented these boys, Myers and Davis, and they got another



(Testimony of Gallen B. Finch)

job and [109] I called up—I think Myers and Davis went to Radich & Brown and asked them if they could rent one and I think that they told them if I would stand back of it, stand good for it, that they would send it down on the 20th of April.

Mr. Davis come to me and said he had a job on the Thomas Ranch, about 17 miles from Palm Springs, and wanted to know if I could get a tractor. He said that he had tried to make a deal with Radich & Brown and had been unable to do so. I told him I would call Mr. Ferguson, which I did that evening. I called Mr. Ferguson and he told me that he would send down a tractor and bulldozer. It was delivered—I think it started down on the 21st and was unloaded on the 21st and it started to work on the 22nd pushing trees on the Thomas Ranch. And then they moved up to another place there, the Taylor Ranch.

I think I talked to Mr. Taylor's foreman. Mr. Taylor was a school teacher at San Diego. I did not come in connection with him, but I did talk to Mr. Taylor's foreman and he assured me that whatever the bill was that I would not need to worry.

The Court: Were you just being a good fellow in the whole picture?

The Witness: No, sir.

The Court: Where was your profit?

The Witness: I had a profit there of \$1 an hour. I [110] was paid \$1 an hour above Radich & Brown's price.

The Court: What is that?

The Witness: I was paid a dollar above the Radich & Brown price. Otherwise the tractor worked 10 hours and I got \$10.

(Testimony of Gallen B. Finch)

Q. By Mr. Brewer: Now, did you know that this equipment was moved to the airport at Palm Springs?

A. I did not.

Q. And if you had been approached on such a subject would you have permitted it to be moved to the airport?

A. No, I would not.

Q. What was the reason for that?

A. Because, the main reason would have been—

The Court: What materiality would that have, whether he would or would not have done something?

Mr. Brewer: Well, I thought it was material, your Honor, for the reason if he would not have done it and if it was done against his will and against his orders he could not be held responsible for it.

The Court: He said that he went to New York and what happened in his absence he does not know. He left it in charge of his foreman.

Mr. Brewer: That is true.

The Court: What arrangement did his foreman have with the operator of this equipment? [111]

Q. By Mr. Brewer: Did you give any instructions to Mr. Stover about what kind of jobs to follow?

A. I did. I told Mr. Stover to—when Mr. Myers or Mr. Davis had come to him and told him they had a new job to go on, to go to the farmer himself personally and have an understandment as to just how the job was that we had—that we had had some misunderstanding before and Mr. Stover was there at the time we had these misunderstandments and he understood just what his requirements was to do.

Q. Well, now, about airport work or anything like that, did you give Mr. Stover any instructions about that?

(Testimony of Gallen B. Finch)

A. No, I didn't, because I never in the least had anything in my mind about an airport.

Q. Did you ever tell Davis & Myers you wanted it only to work on agricultural work?

A. Well, that is what I was hired for down there. I did not tell them—I told them not to take this tractor anywhere, not an airport or even across the road unless they notified me; that I had a misunderstanding with a farmer over nothing and I wasn't going to have any more of it and they knew it. Mr. Stover knew it—the whole bunch knew it.

Mr. Brewer: I believe that is all, your Honor.

Cross-Examination.

By Mr. Lillie:

Q. Mr. Finch, what was the relationship that existed [112] between Davis & Myers and yourself?

A. Davis & Myers? Oh, Davis & Myers?

Q. Yes.

A. The first relationship was that I moved a tractor down on a ranch down there and was working them—otherwise working this tractor for them for so much an hour.

Q. Well, now, when they went out and obtained a job from a farmer who paid you? The farmer or Davis & Myers?

A. Well, at first Davis & Myers was going to pay me.

Q. Well, who paid you though?

A. Well, on different occasions Davis & Myers paid me and sometimes the farmer paid me.

Q. Well, did you bill the farmer?

A. No, I didn't bill the farmer.

(Testimony of Gallen B. Finch)

Q. How did you receive the money from the farmer? How was he to know that he was to pay you instead of Myers and Davis?      A. Well—

The Court: Not what he generally did. Let us find out what he did in this case.

Q. By Mr. Lillie: Just prior to the Palm Springs airport.

The Court: It is evident from this witness' testimony that this equipment started to work on the 22nd and he left the thing in charge of his foreman and went East. [113]

The Witness: That is right.

The Court: And that is all he knows about it.

Q. By Mr. Lillie: Do you know when Thompson—who billed Thompson for the work on his ranch which was done on April 22nd?

The Court: You may answer that.

The Witness: That was not billed to him. He died. I think he died on the first day of May so he was never billed personally himself. His foreman was billed by me two or three—I would say two or three months after then when the estate was started to be filed.

Q. By Mr. Lillie: Well, how long had the equipment worked on that ranch before May 1st?

A. It worked on the Thompson Ranch from the 22nd until the 23rd, moving on the 24th, and started to work on the Taylor Ranch on the morning of the 25th. That was the morning that I left for New York City.

Q. What did Davis & Myers receive for that work?

A. They received my price to them—my price to them was \$13 per hour. Their price to the farmer was \$16. They was paid for surveying it, driving the stakes so the

(Testimony of Gallen B. Finch)

water would flow the right way. Otherwise the grading of the land, leveling it, was left up to them. Otherwise they done the surveying.

Q. Did you pay them the \$3 an hour difference? [114]

A. No. Sometimes I did and—

Q. In this particular job.

A. No, that particular job, I don't think so.

Q. You billed the man subsequently two or three months later, is that correct?           A. That is right.

Q. Did you bill him for \$16 an hour?

A. I did.

Q. Then you received the \$3 over and above the \$13 that Myers and Davis had leased it for?

A. On that particular job I did for the simple reason why we had come into a settlement. Myers—Davis and myself got a settlement and agreed that I owed them so many hours. Otherwise I wanted to collect this money from the farmers myself and so they said I owed them so much money and we got together and I settled with them.

Q. You admitted the liability for the three hours difference but you settled it for the \$3 difference for each hour's work?

The Court: Just what does that prove in this case?

Mr. Lillie: Well, I want to determine whether or not Davis and Myers were his agents. I don't know. They may not be independent lessees.

The Court: There is still a missing link. I don't know yet how this bulldozer got over to the air field. [115]

Mr. Brewer: The next witness will clear that up to a certain extent.



(Testimony of Gallen B. Finch)

Q. By Mr. Lillie: Did you have occasion to bill Wilcox for the lease of the tractor in question that was used on the army airbase?      A. I did, yes, sir.

Q. You did?      A. Yes, sir.

Q. How much did you bill them for—what rate per hour?

A. I cannot say what it was at this time. I think he has a bill, the attorney for Wilcox.

Q. Did the firm of Davis & Myers receive anything from your receipt of the moneys—from the receipt of the moneys you received on that billing?      A. They did.

Mr. Lillie: That is all.

Mr. Girling: One question.

Redirect Examination.

By Mr. Girling:

Q. You said you received \$1 an hour over and above the rate paid Brown and Radich?

A. That is right.

Q. From whom did you receive such \$1 an hour? Who paid it to you? [116]      A. Davis & Myers.

Mr. Girling: That is all.

Q. By Mr. Hart: Jack Wilcox paid you the bill that you tendered him for the use of that bulldozer, did he not?      A. I think he did.

Mr. Hart: That is all.

Q. By Mr. Brewer: Then you paid Davis & Myers the difference between \$13 and whatever the rental rate was?      A. I think that is right.

Mr. Girling: I have another question.

Q. By Mr. Girling: Did you know that Wilcox had leased this bulldozer to Roeder?

A. I didn't even know Wilcox had it.

(Testimony of Gallen B. Finch)

Q. Then I take it your answer is you did not.

A. No, I did not.

Q. Do you know whether or not Roeder had paid Wilcox \$30 or any sum?

A. I never did, no, sir.

Q. Did you ever see an invoice similar to or in fact this very one?

A. No, I never seen that before.

Q. The one headed "Jack Wilcox" and \$30?

A. No, I never seen that.

Q. Now, when I show you the Exhibit E of Radich & Brown, and this is apparently a carbon copy—you received [117] the original of that, didn't you?

A. I did. That is for transportation.

Q. That is the lease arrangement of the dozer?

A. Yes, sir.

Q. And you received the original of which this is a carbon?

A. That is right.

Q. And you knew the terms thereof?

A. Yes, sir.

Q. And you did pay them their bill of \$116 for hauling it down on the low-bed semi trailer?

A. I did, yes, sir.

Mr. Girling: That is all.

The Court: Any further questions?

Mr. Bedford: I would like to ask a few questions.

Q. By Mr. Bedford: You did authorize this tractor to be used for some things other than agricultural clearing, did you not?

A. Such as pushing over trees, yes, sir.

(Testimony of Gallen B. Finch)

Q. And you authorized its use on the school grounds—on a school job, did you not?

A. That was not used on the school ground until afterward—after this particular time.

Q. You say it was after this that the school job was done? [118]      A. Yes, sir.

Q. But you did authorize that, did you not?

A. Yes, because I called up one of the fellows on the school board and he told me that he would see that Davis & Myers paid me. He stood good for it.

Q. And you collected for most of the jobs these tractors were on, did you not, yourself?

A. I did after about May 1st.

Q. You collected from eight or ten of these jobs, anyway, in the last eight or ten jobs they were on, did you not?      A. No, I didn't.

Q. Well, you collected from a man named Hearn, did you not?      A. I did.

Q. And Appadock?

A. My own equipment was on those jobs. That was my personal equipment.

Q. Weren't those jobs that Davis & Myers had to do with?      A. That is right.

Q. But you collected for them?      A. I did.

Q. And Henry—you collected on that, did you not?

A. I think the boys brought the check in made to me and Davis on Henry's job.

Q. And you cashed the check and settled with Davis? [119]

A. They indorsed it on the back, if I remember rightly, and I paid them their share.

(Testimony of Gallen B. Finch)

Q. And on the long job you collected?

A. No, sir, I did not.

Q. You did not collect on that? A. No, sir.

Q. You received your pay, however, on that?

A. Yes, sir; I received my pay. I think that was my own tractor on that job.

Q. You collected on it, then, didn't you?

A. I don't think I did on the long job. I think Mel Myers collected that?

Q. Are you sure? A. I am sure.

Q. And the Jacobs job, did you collect on that?

A. The Jacobs job I did, yes, sir.

Q. And the Shumway job, you collected on that, did you not?

A. Well, that I cannot recall—the Shumway job.

Q. You collected the Beards job, did you not?

A. Part of it.

Q. You collected from Ben Mannasa, did you not?

A. No. Oh, on the Beard job I didn't know they had that job until two or three days after the job started. I did not know they had it for two or three days from the time [120] they moved the machinery from another job over there and that was Radich & Brown equipment. After that job was done Mr. Davis went out there to Mr. Beard's and got Beard to write him a check. I had told Beard it was all right to pay them their proportionate part but I was holding him for \$13 an hour. I said, "If you want to pay them how many hours they have got," I said, "they are signing the tickets. You can go ahead but be sure and pay me the \$13 an hour because that is my part out of which I have got to pay Radich & Brown \$12."



(Testimony of Gallen B. Finch)

I had called Mr. Ferguson on the phone and told him that I had told Mr. Beard that but, anyway, the next day Mr. Otto Davis went out there and talked him into giving him a check for \$3000. He rushed to the bank and cashed it and the balance of the money was paid to me on my demand. Otherwise I got Mr. Beard and Mr. Ferguson and the understandment was that Beard did not pay me or Ferguson that he would be held responsible for it because Davis had not offered to pay us a dime on that job.

Q. In other words, the only way that Davis collected anything was when you authorized the payment by the farmer, or whoever they were working for, to him?

A. No, that ain't right because everybody we went to work on I explained to them that I was only holding them responsible for the OPA rates which I had authorized to me by the OPA of \$13 an hour and \$3 an hour I had nothing to do [121] with because the OPA didn't ever pass that regulation. That was paid to them for surveying and doing the work. I never done any surveying. Had nothing to do with it. They did it. They was paid \$3 an hour either by the farmer—if the farmer wished to pay me I paid them but they done the surveying. They got the jobs. I was just working for them, moving these tractors around for them, but before we moved them I wanted to see that the farmer understood it that I was to be paid \$13 an hour. Mr. Ferguson, Mr. Radich had come down to Indio several times and we all had talked to Mr. Davis and Mr. Myers that all we could charge was the OPA prices. Whatever they charged for surveying was up to them. That we had no part of.



(Testimony of Gallen B. Finch)

Q. In other words, there was a difference between the charges for the use of the tractor or bulldozer and the price for the surveying and whatever other work that Mr. Davis and Mr. Myers did?

A. Yes. Davis & Myers would just go to the farmer and say, "I want to get your job—I want to clear this off."

Q. And you looked to whoever was getting the benefit of the work from the equipment for the pay and for the use of the tractor?

A. Only up to a certain price, \$13 an hour.

Q. In other words, you collected that and looked to them directly to pay you for that which you were getting out [122] out of the tractor?      A. I did.

Q. And you collected from Wilcox for the job that was done with the tractor on the airport, did you not?

A. When I come back from New York, I think on the 6th of May, Mr. Davis brought the time up. In the meanwhile I had had a telephone call and knew about the accident on the 6th of May. Joe Stover told me that the tractor was working there and he brought a bill up and he said that he had a deal with somebody. I don't know who. And they were supposed to pay \$14 an hour and I said—that was after the accident, and I said, "I don't want no part of it."

Q. This is conversation between you and your superintendent, is it not?

A. No, Mr. Davis—Otto Davis.

Q. Davis brought you a bill?

A. Yes, sir; he brought me a time sheet which was signed by Mel Myers, his partner, and he told me to collect from Wilcox and I said, "I don't want any part

(Testimony of Gallen B. Finch)

of it." I said, "You had no business to take the tractor down there." And he said, "Well, you just as well collect from him because he is going to pay you."

Well, I did not bill him until Mr. Wilcox wrote me a letter and wanted me to bill him for this work. Well, Radich & Brown had billed me and I did then bill him and I wrote on [123] the bill, "This tractor was taken on this job without my consent." I did not know anything about it and that, "This money, I didn't have nothing to do with the arrangement the time it was on there at all, but that his foreman, Wilcox' foreman and Mr. Davis had agreed upon a certain price, OPA rates," and that is what he was billed for, only on his bill, where I billed him, I said that he had the tractor without my knowledge of him having it. He had no business to have it down there and that is the way I was accepting that money.

The Court: What did Davis say when you told him he had no business taking it down there?

The Witness: Well, he said that he had called Mr. Ferguson on the phone and had authorization from Mr. Ferguson to take it. I says, "Well, I will call Mr. Ferguson," which I did, and he said that Mr. Davis had never called him at all.

Q. By Mr. Bedford: You collected the ceiling price?

A. I collected the amount that Davis, Mr. Otto Davis, told me that he had agreed with this foreman. The two had agreed on a set price and Davis told me the price and that is what he was billed for.

Q. And all that Mr. Davis and Myers got out of it was for their service over and above what the tractor or bulldozer did, isn't that correct, on all of these jobs?

(Testimony of Gallen B. Finch)

A. Well, on this particular job you probably know more [124] how that was handled than anybody else. You was the one that made the settlement and furthermore you knew all about this deal when you made the settlement. I told you that this job—how it was and you made it for Mr. Otto Davis.

Q. Well, can you answer the question?

A. Yes, sir.

Q. Will you answer it?                    A. (No answer.)

Mr. Bedford: Will you read the question.

(Question read.)

A. Well, they got more than that. They got probably two or three thousand dollars more coming to them. I paid them more than they really had coming to them.

Q. Now, what I am getting at is, in your agreement with them you were to get the ceiling price for the use of the tractor or bulldozer and they were to get paid for whatever they earned by surveying?

The Court: That has been asked and answered three or four times, Mr. Bedford.

Mr. Bedford: I did not get it.

The Court: He answered that he got the ceiling price and they charged \$3 extra for their surveying and arranging for the work.

The Witness: That is right.

Q. By Mr. Bedford: When did you get back from the [125] East, Mr. Finch?

A. I think I got back the night of the 5th of May.

Q. And when did you first go down to Coachella or Indio or Palm Springs and check up on this equipment?

A. I never did go there. The night when I got home, on the 5th I think, I called Mr. Davis. I had heard about

(Testimony of Gallen B. Finch)

the accident and I called him up and asked him why he took it over there and I think I seen him the next day when he handed me this bill that they had agreed on. I never did go to the airport depot on this occasion at all about this tractor.

Q. When did you go down to the Valley and check up on any of this equipment?

A. I think Joe Stover—I seen him the following Saturday and he told me that he had—about the accident, and they both did and we understood at that time it had been settled and the next time I think that I seen Davis was in Indio on this Beard matter.

Q. When after you returned from the East did you first get your report from Mr. Stover, your superintendent or foreman?

A. The night of the 5th.

Q. And at that time did he tell you where all of these tractors were working?

A. Yes. [126]

Q. And where the one involved in this case was working?

A. He did.

Q. And that tractor continued to work at the airport until the 10th, did it not?

A. Yes, sir. I told Mr. Stover to go down to the airport and see if he couldn't get it out; that he should never have allowed it to go there because—

Mr. Bedford: We will object to any conversation between you and Mr. Stover.

Q. By Mr. Bedford: But you did get a report from him?

A. I did.

Mr. Bedford: That is all.

Mr. Hart: One question. Was there a carry-all attached to this bulldozer at all times it was rented out?



(Testimony of Gallen B. Finch)

A. Not on this particular job when the accident was.

The Court: I did not understand your question.

Mr. Hart: Was there a carry-all attached to the bulldozer at all times it was rented out?

The Court: What is a carry-all?

Q. By Mr. Hart: Would you describe it for us?

A. The carry-all was a large scraper. It is pulled behind the tractor.

Q. By Mr. Hart: Who owned the carry-all?

A. I did. [127]

Q. That did not belong to Radich & Brown?

A. It did not.

Q. Was the price affected by whether or not a carry-all was attached to the bulldozer?

A. Yes, sir, that made a difference.

Q. But there was no carry-all on this job?

A. There was no carry-all where the accident occurred.

Q. But had the carry-all gone with the equipment?

A. It did, yes. That is what Mr. Stover told me. We had had the carry-all setting by the side of the road, the Palm Springs road waiting on a welder for several weeks. It had been broke down and Mr. Stover tells me the story that—

The Court: Do not tell us what Mr. Stover said.

Mr. Hart: That is all.

The Court: What is your business?

The Witness: Contractor.

Q. By Mr. Bedford: The carry-all was used on the Wilcox job for the clearing of land or grading of the land for the hangar, was it not?



(Testimony of Gallen B. Finch)

A. I could not tell you because I don't know what was used on the job. I know it went down there on the job but I don't know whether it was ever used or not.

Mr. Bedford: That is all.

Q. By Mr. Girling: By the way, while you are here, you have operated carry-alls and bulldozers? [128]

A. Yes, sir.

Q. In your experience over how long a period of time have you operated bulldozers and carry-alls?

A. Eight to ten years.

Q. Based upon your eight to ten years experience in the operating of bulldozers, is it harmful to operate them on a 14- or 15-mile trip up a dry wash?

A. It certainly is.

Q. Does it add to the wear and tear of a bulldozer to have it pull a carry-all behind it for 14 miles?

A. It does, absolutely. Any man who takes a D-8 Cat and runs in the sand pulling a carry-all it is enough to tear the rollers to pieces.

Q. Those are the things that operate the Caterpillar tread?      A. That is right.

Q. It can do more than \$1000 worth of damage, can't it?

A. In fact, I never would permit a carry-all to be taken over two miles at the most.

Q. Two or three miles was the most that you would permit a carry-all to be hitched on back of a bulldozer?

A. Yes, sir. If I had been there this tractor would never have gone down that wash for 14 miles at \$15 or \$40 or \$50 an hour.

Mr. Girling: That is all. [129]

(Testimony of Gallen B. Finch)

Mr. Hart: I would like to ask Mr. Goodine be excused.

Mr. Bedford: Just one more question.

The Court: I am not going to permit your people to pick at a witness constantly. Usually I am quite liberal in that respect but there will have to be a limit here.

Mr. Hart: I wanted to excuse Mr. Goodine, if I might.

The Court: Is there any objection?

Mr. Lillie: No objection.

Mr. Girling: I have none.

Mr. Brewer: And I have none.

The Court: All right, you may be excused.

Mr. Bedford: I want to ask one question that was brought out by the cross-examination.

The Court: All right, you may ask your question.

Q. By Mr. Bedford: As a matter of fact, there wasn't only about—

The Court: Just a moment. Remember he is your witness now.

Q. By Mr. Bedford: Isn't it a fact, Mr. Finch, that it was only about four and a half miles from where this tractor had been working to the point on the airport where it was taken?

A. Well, as the crow would fly I would say it was every bit of 14 miles from where this tractor left the morning when it did until it went to the airport. [130]

Mr. Bedford: That is all.

(Witness excused.)

JOE STOVER,

called as a witness on behalf of Defendant Finch, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Joe Stover.

Direct Examination.

By Mr. Brewer:

Q. Where do you live?      A. San Bernardino.

Q. And were you employed by Mr. Finch in April and March and May of this year—of 1944?

A. Yes, sir.

Q. Were you employed by him at the date of this accident on May 2, 1944?      A. Yes, sir.

Q. And you heard Mr. Finch's testimony that he left for the East a little before the 1st of May, do you remember that?      A. Yes, sir.

Q. And did he leave you in charge of his equipment down in the Valley at that time?      A. Yes, sir.

Q. You had several pieces of equipment there that were [131] being used by Davis & Myers?

A. I did.

Q. And did you ever hear any conversation between Mr. Finch and Mr. Davis, Otto Davis, and Mr. Myers of Davis & Myers, with reference to the moving of this equipment of Mr. Finch's or that which he had leased from Radich & Brown to new jobs?      A. I did.

Q. What was the conversation that was had on that subject, if you recall the substance of it?

A. Well, Mr. Finch told Otto Davis and Mel Myers not to move any of the equipment on any job without consulting me or him first.

(Testimony of Joe Stover)

Q. And on the particular—this accident happened, I believe, on May 2nd, on the particular day of, we will say of May 1st, the particular equipment that was involved in this accident, where was it working then?

A. Working about 14 miles below Palm Springs on the Indio highway.

Q. Do you recall the name of the ranch or the job?

A. No, I don't offhand.

Q. And were Davis & Myers doing that job?

A. Yes.

Q. Did you hear Mr. Finch and Mr. Davis and Mr. Myers discussing this subject of not moving the equipment without [132] his understanding and consent?

Mr. Lillie: If the Court please—

Q. By Mr. Brewer: Upon more than one occasion?

Mr. Lillie: If the Court please, I am going to object to the question on the basis it would be heresay and not binding upon the government, a conversation that was had between this witness—he overheard between Meyers and Davis and Mr. Finch.

Mr. Brewer: It shows the relationship of the parties, your Honor. One of the important things in this case is the relationship.

The Court: The objection is overruled.

Mr. Brewer: Will you read the question?

(Question read.)

The Witness: Yes, sir, I think there was two different times I know of—I am sure.

Q. By Mr. Brewer: What did Mr. Davis and Mr. Myers say with reference to doing that?

A. Well, they said they would not—they would consult me first if Mr. Finch wasn't there on the job.

(Testimony of Joe Stover)

Q. Now, did Mr. Davis or Mr. Myers, either one, consult you about moving this equipment to the Palm Springs airport? A. No, sir.

Q. Did you know anything about it at the time it was [133] done?

A. No, sir. I didn't know it until after the accident—even where it was.

Q. Where were you at the time, that day?

A. Well, I come down—had a welder to come down and work on the carry-all and I see it was gone.

Q. Saw what was gone?

A. The carry-all, the scraper, and I went to following the tracks and they cut up through the wash and I drove as far as I could in my car and then I went to walking up the wash and I met Otto Davis coming back down.

Q. Did you have a conversation with him at that time?

A. Yes, sir.

Q. Well, was anyone else present?

A. No, just Otto Davis and myself.

Q. What did he say and what did you say?

A. I asked him where the Cat was gone and he said that he had a rush job up at Cathedral City, a land leveling job. He told me exactly where it was supposed to have been.

Q. What did he say?

A. Well, he says this was a rush job, only a couple of days' job off the left of the road at Cathedral City. That is six miles this side of Palm Springs. And I goes back, back down to where there was a couple of other Cats working to give this Cat time enough to go up there and I went up in [134] the afternoon to find it and couldn't find it.



(Testimony of Joe Stover)

Q. You went to Cathedral City?

A. Cathedral City, at the exact spot it was supposed to be.

Q. And it wasn't there?

A. It wasn't there, no, sir.

Q. Tell us what else you did?

A. I go back to find—I went to Indio and I found Mel Myers, Otto Davis' partner.

Q. Did you have a conversation with him?

A. I had a conversation.

Q. What did he say and what did you say?

A. Well, I told him that this Cat was supposed to be up at Cathedral City and I couldn't find it. I wanted to get it—the welder was to do some work on the scraper, the carry-all, and he said that Otto Davis told him it was there so we both went back up to Cathedral City.

Q. Did you find it there?                      A. No, sir.

Q. When was the first time you had knowledge of where it was?

A. It was 7:00 o'clock that evening.

Q. And what had happened then?

A. Well, Clarence Davis, the boy that was operating it—we all ate in the same restaurant there in Indio. He come [135] in to eat and he told me he had backed into an airplane wing and I said, "How did you do that up around Cathedral City?" And he said he wasn't there, that he was at the airport in Palm Springs.

Q. And was that the first knowledge you had of it?

A. First knowledge I had.

Q. That it was at the Palm Springs airport?

A. Yes, sir.

(Testimony of Joe Stover)

Q. In other words, the accident had happened at that time?      A. Already happened, yes.

Q. So that the accident happened the same day it was moved?      A. The same day the tractor was moved.

Q. Now, do you know the means or what route this piece of equipment took from the place where it was to the Palm Springs airport? Will you describe that?

A. I can't tell you just the way it went after the first four or five miles. That is as far as I got up there when I met Mr. Davis coming back, but I imagine he went straight on up parallel with the highway, the Indio-Palm Springs highway.

Q. Across the desert?

A. Yes, up through the wash; an old dry wash runs through there. [136]

Q. About how many miles is that?

A. Oh, I would say around 12 or 14 miles, I believe.

Q. Is that harmful to that kind of equipment?

The Court: We are not interested in that. There is no complaint here for damage to equipment, is there?

Mr. Brewer: No, your Honor. I thought it might be relevant.

The Court: It was mentioned before but I do not see what materiality there is to it.

Q. By Mr. Brewer: If Mr. Davis had asked you to allow the equipment to go up to the Palm Springs airport for this job would you have consented to it?

A. No, sir.

Mr. Bedford: Object to that as calling for a conclusion of the witness.

(Testimony of Joe Stover)

The Court: It has been asked and answered. May I ask, have they found the operator, Clarence Davis, yet?

Mr. Girling: Yes. I talked to him. He will be here. I met him at my office at noontime.

Mr. Brewer: I believe that is all—one more question. Did you subsequently then go up and try to get this equipment back from the airport, sir?

A. Yes, sir.

Q. And who did you talk to there?

A. Talked to Hank Goodine and Joe Monahan. [137]

Q. *How* is Joe Monahan?

A. He was the government engineer.

Q. United States Engineers? A. Yes.

Q. And what did you tell them about the fact of it being there?

Mr. Bedford: Objected to as being heresay. They are not parties to this action and object to any conversation between them.

Mr. Brewer: Goodine is the superintendent for Wilcox, one of the parties in the action.

The Court: I am going to admit it. You brought out the fact that it stayed there for two days, I think, after the accident.

Mr. Bedford: I think it was more than that—eight days.

The Court: Eight days, or whatever the period was. I think we are entitled to know why.

Q. By Mr. Brewer: Which one of them did you talk to first, Mr. Stover?

A. I talked to both of them at the same time.

(Testimony of Joe Stover)

Q. And where was this? In the United States Engineers' office?

A. No, at the gate where you go in, the main gate going into the airfield. [138]

Q. Will you relate substantially what the conversation was, sir?

A. Well, I told them Otto Davis had no business letting the Cat come up there to start with and I wanted to get it out of there and Goodine said, "Well, we have only got about one more day." That was two days after the accident. "Only got about one more day and could we use it for one day." I said, "As long as it isn't over that," and Joe Monahan told me we would have to go through procedure after they got a piece of equipment on a government job and that it is hard to get it off. They wanted to keep it there and just let it stay and they kept it eight days. Just eight days exactly, all told.

Mr. Brewer: That is all.

Cross-Examination.

By Mr. Lillie:

Q. It was on the 2nd of May, 1944, that you first found out that the tractor went up to the Palm Springs airport, is that correct?      A. That is right.

Q. You testified that evening at dinner you ate at the same restaurant that the operator ate at?

A. That is right.

Q. At that time did he tell you where the tractor was?

A. At the dinner table that night. [139]

(Testimony of Joe Stover)

Q. You did not give him any instructions as to whether he was to return there or not, did you?

A. How do you mean that?

Q. You did not tell him that he could not return to that job, did you?

A. No.

Mr. Lillie: That is all.

Q. By Mr. Fraser: Did I understand you to say that the bulldozer arrived the day after the accident?

A. The day of the accident, yes.

Q. On the day of the accident?

A. Yes. I am almost sure it was. I haven't got the date.

Q. You are not sure whether it was taken there two days before or the day of the accident?

A. I think it was the same day of the accident.'

Q. When did you last see the equipment before the accident?

A. You mean—

Q. Before the accident when did you last see the equipment?

A. Well, I would see it every day.

Q. See it every day?

A. Yes, sir.

Q. So you think you saw it the day before the accident? [140]

A. Day before the accident? Well, I couldn't be positive on that, whether it was the day before. I come to San Bernardino one day. Well, I am almost sure it was on the same day of the accident that it was moved up there.



(Testimony of Joe Stover)

Q. Where did you see it—did you see it on the day of the accident?

A. I never seen the Cat after the accident until we got it out of the field again.

Q. But did you see it on the morning of the accident, before the morning?

A. Off at a distance when they was moving it up. I never did catch up with it.

Q. You saw it on its way over to the airport?

A. Yes.

Q. And what were you driving?

A. Driving a panel pickup.

Q. You did not catch up with them?

A. Had to stop. Couldn't go no further in the sand. And he was out-traveling me on foot.

Q. Then you are quite certain it was not on the job before May 2nd at the Palm Springs airport?

A. I am quite sure it was May 2nd.

Mr. Fraser: That is all.

Q. By Mr. Girling: Whether it was on the job the day before or six days before, you did not know it was there until [141] the accident happended, did you?

A. That is right.

Mr. Girling: That is all.

(Witness excused.)

Mr. Brewer: That is all the witnesses I have, your Honor, for the defendant Finch.

Mr. Girling: Have you gentlemen any witnesses to put on?

Mr. Fraser: Yes, I have a witness; Mr. Roeder.

WALTER S. ROEDER,

called as a witness in his own behalf, being first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Walter S. Roeder.

Direct Examination.

By Mr. Fraser:

Q. What is your business, Mr. Roeder?

A. Contractor.

Q. And where is your office located?

A. 2391 Main Street, Riverside.

Q. And did you on May 2, 1944, have work at the airport at Palm Springs?           A. I did.

Q. And what was the nature of your work?

A. Pipeline construction. [142]

Q. On the morning of May 2nd did you have any conversation with Mr. Wilcox or his foreman, Henry Goodine?           A. I did.

Q. Who did you talk to?           A. Mr. Goodine.

Q. And what was the nature of the conversation?

A. I asked Mr. Goodine if he could send his man over to level down for our pipeline.

Q. And what was the answer?

A. He said he would.

Q. And was anything further said?

A. He said, "When do you want it?" And I said, "As soon as we have set the stakes along the line." And he said, "All right." He said that as soon as we got ready to leave him know. Well, in the meantime he come over and told my foreman he was ready to move the tractor over and then I left him.

(Testimony of Walter S. Roeder)

Q. Did you at any time give the driver of the tractor any instructions?

A. No, I never talked to the driver.

Q. Never talked to him at all?      A. No.

Q. Your conversation was with Mr. Wilcox' foreman, Henry Goodine, is that it?      A. That is right.

[143]

Q. Did you at any time pay the operator of the tractor or the bulldozer?      A. I did not.

Q. Did you ever furnish any gasoline or oil for the equipment?      A. No, I didn't.

Q. Were you billed for the services of the tractor and the operator?      A. I was.

Q. Who billed you?      A. Mr. Wilcox.

Q. And you paid the bill?

A. I paid the bill, yes.

Q. Do you remember the amount of the bill?

A. Two hours, \$30.

Q. And that covered the services on that day and another day?

A. Yes. It covered the services for that day and then when he come back he back-filled the ditch.

Q. How long after May 2nd was it he came back?

A. About two or three days. I don't remember just exactly, but two or three days.

Mr. Fraser: That is all.

The Court: Any questions?

Mr. Lillie: No questions. [144]

(Witness excused.)

Mr. Fraser: I am through.

Mr. Bedford: Mr. Davis.

OTTO DAVIS,

called as a witness on his own behalf, being first duly sworn, was examined and testified as follows:

The Clerk: State your name.

The Witness: Otto Davis.

Direct Examination.

By Mr. Bedford:

Q. Mr. Davis, what was your arrangement with Mr. Finch as far as using this equipment was concerned?

Mr. Brewer: We object to that as calling for a conclusion of the witness.

The Court: That is true.

Mr. Bedford: Very well.

Q. By Mr. Bedford: Did you pay the operator on this bulldozer-tractor? A. No, sir.

Mr. Girling: Objected to as irrelevant and immaterial.

The Court: Objection overruled. There isn't any question, is there, gentlemen, that his regular pay check came out from Radich & Brown?

Mr. Girling: I should not think so. I stipulated to it.

Mr. Bedford: Very well. [145]

The Court: Just tell us when you first contacted Mr. Finch with reference to renting the equipment.

The Witness: Well, your Honor, I would not know just exactly when it was. We had at that time—we already had two tractors that we had working that we had already obtained from Mr. Finch.

The Court: You heard Mr. Finch's testimony to the effect, if he recalled correctly, you had attempted to arrange with Radich & Brown for a tractor.

A. I had never been in Radich & Brown's office.

(Testimony of Otto Davis)

The Court: Well, had you ever talked to either of them?

The Witness: Not at that time.

The Court: About renting equipment?

The Witness: No, sir, I never had.

The Court: Well, what conversation did you have with Mr. Finch relative to the renting of this equipment? When was the first conversation?

The Witness: I met a friend of Mr. Finch's in San Bernardino and I asked him—I said, "Do you know of any of the boys around here that have got some equipment to rent?" And he said, "Yes, I have a friend here, Glen B. Finch, that has some equipment." And so he gave me Mr. Finch's address and telephone number and that night I called Mr. Finch and talked to him and he said, "Yes, I own a couple of tractors, three tractors." I have forgotten how many he told me he owned at [146] that time, but he said they were on a job up in the north doing some revetment work, or something, for the government, but, he said, "They are going to be released." I said, "Can you let me have one?" And he said, "I can let you have two of them."

Well, shortly after that he got us one from Mr. Radich & Brown.

The Court: Is that the tractor involved in this accident?

The Witness: It was the first one we got from him. Then we got another job and we asked for another tractor and he sent us another tractor. That also belonged to Radich & Brown. And then when I had a job come up at the Palm Village Land and Water Company I needed another tractor. The two that I had was busy, so I also



(Testimony of Otto Davis)

went to Mr. Finch and he got me this other tractor and that landed out there, I think, the 21st or 22nd day of April.

The Court: Is that the one you had the accident with?

The Witness: Yes. It was unloaded at the Palm Village Land Company. That is where it was working. And we were at that time rooting out trees, grapefruit trees, that were interspersed with dates, and I had come on home after it was working. I come on up to San Bernardino and that day while we were in San Bernardino, or that night when I was in San Bernardino, the fellow that is known as Hank called [147] me long distance and told me that he and Joe Monahan, who was then resident engineer for the United States Engineers at the Palm Springs airport, had been hunting me all day; that they were in a spot; that they needed some help. He said they had been everywhere trying to get a piece of equipment to help them out for a few days and they couldn't find one and he wanted to know if I would help him out for a few days. I said, "Well, I can't tell you until I come down and see the farmer in the morning." I said, "If it is okay with him, Hank, I will let you do it," because I had exchanged equipment with him on the San Bernardino airport when I needed help and he let me have some, so when he needed help I let him have some. At that time I was with the Harvey Adair Construction Company and I went and talked to a man by the name of Smith, who was manager for the Palm Village Ranch and he said, "How long will it be?" "Well," I said, "Mr. Goodine told me three or four days he could do the job in. It was just an excavating

(Testimony of Otto Davis)

job for the clearing off and leveling of the foundation for the new hangar." He said, "If you can get back in time to straighten out my grove so I can get my water back on it, it will be all right." So I did. He said he would not want to miss a water turn. He said, "I will let it go," so I told Hank that he could have it and went down and told Clarence Davis, who was the operator, to hook onto it—tie his dozer up and hook onto the carry-all [148] and take it down to Palm Springs airport. I think he left there somewhere around 10:00 o'clock in the morning.

The Court: What did Davis say?

The Witness: He did not say anything at all. He just hooked onto it and went down there. And along in the afternoon I saw Clarence, oh, I imagine he was two-thirds of the way to the airport. I saw him in this big wash that goes right into the airport.

That evening I went down and saw Clarence and we parked the tractor at the side of the hangar where it was supposed to do the work and then I came back up and I never saw that again until I went down three or four days later to see Mr. Goodine to see when he would be through or if he was through with it, and when I come home that evening I heard that there had been this accident. I never saw the plane; didn't know where it was standing or what the tractor was doing at the time.

The Court: Well, you heard Mr. Finch's testimony relative to a conversation he had with you shortly before he left for New York in the presence of his foreman concerning the handling of this tractor.

The Witness: Yes, I did.

(Testimony of Otto Davis)

The Court: Was there such a conversation?

The Witness: I never remember any conversation of that type nor I never did consult Mr. Finch regarding moving it [149] from one job to another whenever I had a job. Whenever I had a job I moved that piece of equipment and as soon as Mr. Finch would find out where it was, after it was moved, he would immediately contact the farmer and tell the farmer not to pay Davis & Myers but to pay Finch.

The Court: Well, Finch was simply protecting himself, was he not?

The Witness: Every time we settled up with him he owed us money. We didn't owe him anything, so I don't see where the protection is.

The Court: But he had protection, didn't he?

The Witness: He certainly did.

The Court: You know the equipment belonged to Radich & Brown?

The Witness: Yes, sir.

The Court: And did this Clarence Davis at all times operate that equipment?

The Witness: Yes, sir.

The Court: Did you at any time pay Clarence any money?

The Witness: No, sir.

The Court: For any purpose whatsoever?

The Witness: No, sir.

The Court: Did you furnish any fuel for the tractor?

The Witness: Not any.

The Court: Who took care of the tractor? [150]

The Witness: He took care of his own tractor. He operated so many hours a day and then took care of

(Testimony of Otto Davis)

his operation, of his own tractor. There was part of the time that he took care of it and part of the time—I don't know whether Stover took care of it or not.

The Court: Did you make any money from the operation of the tractor or was it from your surveying and the engineering and acquiring the jobs and so forth?

Mr. Girling: It is irrelevant and I object to it for that reason.

The Court: The Court's curiosity has been aroused in this case. I think it is immaterial but I was wondering in all of these transactions and accomodations, and so forth, who was being paid for it. It is really immaterial, Mr. Bedford.

Mr. Bedford: I thought it might be material. I think this was merely a favor being done here and I think this might help to show it was and that we did not authorize the letting of it out on that second job.

The Court: Your question does not tend to prove or disprove that.

Mr. Bedford: I can ask a question that will do that.

The Court: Let us get down to the issues.

Q. By Mr. Bedford: Did you make any profit on this?

The Court: The question is immaterial, I said. That [151] does not tend to prove nor disprove any of the issues in this case.

Q. By Mr. Bedford: Was there anything in your conversation with Hank, I believe is his name, the man that you let have the tractor for Wilcox, was there anything in your conversation regarding the time you could spare the tractor or how long the job was to be?



(Testimony of Otto Davis)

A. He told me that he figured it would take three or four days and that is what I went and told the farmer.

Q. And was there anything said about what it was to be used for on that job?

A. Yes, sir. He told me that he wanted to do some excavation work, clearing and leveling for the foundation for a new hangar that was being built on the Palm Springs airport.

Q. Well, was it let for that specific job only?

A. That is all I knew about. That is all I let it for because I was supposed to get the tractor back in three or four days and clear this man's date grove so he could get the water back on it.

Mr. Bedford: That is all.

Q. By Mr. Brewer: Mr. Davis, did you meet Mr. Stover part way up the route that this tractor took when you returned from that route?

A. I didn't even go down on that route. I walked down [152] and showed the driver, Mr. Davis, where to go in the wash.

Q. I am talking about Mr. Stover.

A. That is what I mean. I did not go down on it and did not meet him on that route.

Q. Did you have a conversation with him a right short while after the tractor started out and while it was on the way, in which you told him that you had a rush job and you were taking it over to Cathedral City?

A. No, sir, I did not.

Q. And didn't you tell Mr. Myers, your partner, that that was where the job was?

A. No.



(Testimony of Otto Davis)

Q. It was over at Cathedral City on the left-hand side of the road?

A. No, sir, because Mr. Myer knew where the job was.

Q. Did you know that Mr. Myers went over there with Mr. Stover looking for the tractor that afternoon?

A. No, sir, I did not.

Q. You would not say that you did not have a conversation with Mr. Finch in Mr. Stover's presence on or about the 15th of April with reference to the fact that you should not move this equipment and take any new job until he had talked to the farmer and talked to you and consented to the job?

A. I don't recall any such conversation.

Q. You don't recall any such conversation? [153]

A. No, sir, I do not.

Q. Did Mr. Stover tell you you had no business taking that thing, allowing that tractor to be taken over to the airport?

A. No, sir. The first conversation I had with Mr. Stover on that was one day Mr. Stover said he had talked with Mr. Finch by telephone and told him about the incident, the wreck, and that is the first time I recall having any conversation with Mr. Stover regarding it.

Mr. Brewer: That is all.

Q. By Mr. Girling: During that conversation isn't it a fact that Mr. Stover told you that you had no business letting this equipment go on the government airport?

A. That is what I say, I do not recall any such conversation at all with Mr. Stover regarding it, because I

(Testimony of Otto Davis)

never talked with Mr. Stover that I know of until after he told me that he had called Mr. Finch after the accident had happened.

Q. Now, we have established an occasion after Mr. Stover had called Mr. Finch that you did have a conversation with him.           A. Yes, sir.

Q. I will ask you this: During the course of that conversation did not Mr. Stover say in substance or in direct words that you had no business letting this equipment go to [154] the airport?           A. No, sir.

Q. You never leased this equipment from Radich & Brown, did you?           A. No, sir, I did not.

Q. You don't know what terms it was leased from them on, do you?           A. I do not.

Mr. Girling: That is all.

(Witness excused.)

Mr. Bedford: That is all we have, your Honor.

Mr. Girling: Mr. Clarence Davis.

### CLARENCE DAVIS,

called as a witness on his own behalf, being first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Clarence Davis.

Direct Examination.

By Mr. Girling:

Q. Where is your home, Mr. Davis?

A. I live in Van Nuys, California.

Q. How long have you lived in Los Angeles County?

A. Five years.

(Testimony of Clarence Davis)

Q. What business or occupation do you follow?

A. Construction work, operator, operating engineer, I [155] should say.

Q. You are acquainted with the firm of Radich & Brown?      A. Yes, sir.

Q. And Mr. Ferguson, who is connected with that firm?      A. Yes, sir.

Q. During the month of April, 1944, were you working for them?      A. Yes, sir.

Q. In that month and toward the 22nd or 21st of April, 1944, did you have occasion to leave the city of Los Angeles in connection with the operation of any of their equipment?      A. Yes, sir.

Q. Whereabouts did you go?

A. Went down to Palm Village, about 17 miles south-east of Palm Springs.

Q. What was the equipment that you—did you accompany the equipment when it went there?

A. I accompanied it.

Q. State what the equipment was.

A. It was a D-L bulldozer.

Q. With a blade?      A. Yes.

Q. And how was it taken down?

A. On a Radich & Brown low-bed. [156]

Q. Do you know who had signed any lease agreement for this equipment?

A. They told me it was—

The Court: Just a minute. Did anybody sign for the equipment? We know who made the arrangements for it.

Mr. Girling: I can shorten it by asking direct questions.

(Testimony of Clarence Davis)

The Court: Proceed.

Mr. Girling: If there is no objection to leading I will ask leading questions.

The Court: There is no dispute as to who made arrangements for this equipment. Mr. Finch made arrangements for it.

Mr. Hart: His statement is in the record. It went in the evidence this morning.

Mr. Girling: This part hasn't gone in.

Q. By Mr. Girling: Were you advised from whom you should take any suggestions or orders when you got there?

A. I understood it was to go to Mr. Finch.

Q. And when you got there what happened?

A. When I got there I met Mr. Finch on the road and he said, "There is a man down the road, Mr. Otto Davis, who will tell us where to go and what to do.

Q. And from that time on did you take orders from Mr. Otto Davis? [157]

A. Mr. Davis.

Q. Now, on the matter of going to the airport, whose orders did you take to go to the airport?

A. Mr. Davis.

Q. Mr. Otto Davis? A. That is right.

Q. And when you arrived at the air base was Mr. Otto Davis there? A. He met me there.

Q. Met you at the base? A. Yes, sir.

Q. Did he introduce you or present you to anyone?

A. Introduced me to Mr. Hank Goodine.

Q. That is the foreman for Mr. Wilcox?

A. That is right.

(Testimony of Clarence Davis)

Q. And when he introduced you to Hank Goodine what did he say in your presence?

A. He told me that this was the man I would be working for there on the airport.

Q. And from then on while you were at the airport did you take orders from Mr. Hank Goodine?

A. Yes.

Q. Do you recall where they put some planks across an air strip to take the equipment over?

A. Yes, sir. [158]

Q. Before the planks were put there who was it had any conversation in your presence as to whether or not you should take the equipment over the planks to the air strip?

A. Well, the foreman for the man that put in the pipe-line and Hank.

Mr. Girling: Mr. Cox, would you stand up?

The Witness: I think that is the gentleman that talked to Hank.

Q. By Mr. Girling: What did he say?

A. Well, I didn't hear the conversation. I just saw them.

Q. He talked with Hank?

A. Talking out to the side and then Hank came to me and told me what to do.

Q. And did you cross the strip, this paved strip of the air base on the planking?      A. I did.

Q. Did you notice who put the planking there?

A. Some laborers. I could not say who.

Q. And did you cross over it then and start to work after you crossed it?      A. Yes, sir.



(Testimony of Clarence Davis)

Q. Now, did you see Mr. Cox, the foreman for Mr. Roeder, over there?      A. He was there. [159]

Q. After you arrived and actually started work?

A. Yes, sir.

Q. Did he tell you what you were to do?

A. Told me they wanted that flattened out so they could use a ditching machine, trenching machine.

Q. Was anything said about any stakes?

A. Told me to go down the line of stakes.

Q. Were any other laborers along with him?

A. There were.

Q. Did you go down the line of stakes?

A. I did.

Q. What, if anything, did Mr. Cox or any of his laborers do toward directing you as you went down the line of stakes?

A. Oh, part of them were there and on this particular part where I had the accident they were all around there.

Q. What were they doing towards directing you, if anything?

A. Well, motioning with their hands.

Q. Can you show the court—if you have to stand up, do so—can you show the court what they were doing?

A. Well, I don't know whether anyone could understand it or not, the motions they made with their arms this way and that.

Q. And in addition to watching their arms what else [160] were you watching?

A. Looking down over my shoulder at the black top.

Q. That is the pavement?      A. Yes, sir.

Q. That is a kind of pavement, black top, and they put the planks on it so the treads would not tear it up?

A. Yes, sir.

(Testimony of Clarence Davis)

Q. Why were you watching it?

A. So I would not back onto it.

Q. You were watching that and these men signaling too?

A. Yes, sir.

Q. And while you were doing this it is my understanding that the back end of the bulldozer came in contact with the wing of the plane.

A. That is right.

Q. Now, did you hear anyone talking or yelling at you, or anything?

A. No, sir.

Q. Was that due to the noise that this tractor makes?

A. That is right.

Q. How long since anyone had signaled you to slow down or come ahead or what not?

A. Well, there hadn't anyone signaled me to come ahead. I couldn't understand the signals from anyone. They was all waving their arms and probably shouting but I couldn't hear [161] that.

The Court: You stated you received orders from Otto Davis as to what work was to be done.

The Witness: He just told me to go to the airport.

The Court: Did he give you any instructions as to how to operate the equipment?

The Witness: No, sir.

The Court: That was your business?

The Witness: That was my business.

The Court: He simply directed you to the work and told you the kind of work that was to be done?

The Witness: That is right.

The Court: And from your experience you knew how to do it?

The Witness: Well, I thought so, anyway, sir; yes, sir.

(Testimony of Clarence Davis)

The Court: You are the only one that knew how to do it, isn't that correct?

The Witness: Yes, sir.

The Court: So far as you knew?

The Witness: Yes, sir.

The Court: And that was a part of your job?

The Witness: That was my job.

The Court: In other words, you went to this particular job at the airport because you were directed to go there and do that and you were in the course of leveling out this [162] ground for the ditching machine when the accident occurred?

The Witness: Yes, sir.

The Court: There was no one who directed you how to do the work any more than to tell you what they wanted done?

Mr. Girling: If your Honor please, may I offer an objection to the court's question?

The Court: Certainly, anytime.

Mr. Girling: I will withdraw the objection because I will bring it out myself. Your Honor, I think you have a misconception. The witness has testified heretofore that they told him he was to go down a row of stakes—follow the stakes. I am referring to this witness who testified that he was told by Cox to knock down a row of stakes.

The Court: You are telling this witness what to testify to. Let him bring it out. If you have an objection to the court's questions, make your objection.

Mr. Girling: May I have the Court's question of the witness?

The Court: Read the question.

(Question read.)

(Testimony of Clarence Davis)

The Witness: No, sir.

The Court: You had been an operator of this type of equipment for several years?

The Witness: Three anyhow.

The Court: And you were familiar with the equipment? [163]

The Witness: Yes, sir.

The Court: And when the equipment went out you were sent out as an operator of that equipment?

The Witness: Yes, sir.

The Court: And you stayed with the equipment and operated it all the time it was on a job?

The Witness: Yes, sir.

The Court: And the thing in this case is you just happened to back a little too far?

The Witness: Yes, sir.

The Court: In the course of your work?

The Witness: Yes, sir.

The Court: And you were watching the edge of the strip so you would not tear into it?

The Witness: Yes, sir.

The Court: That is the whole thing?

The Witness: That is right.

The Court: Now, who paid you for your work?

The Witness: Radich & Brown at all times.

The Court: Did you notify them at any time that you were not doing agricultural work but were doing airport work?

The Witness: No, sir.

The Court: All you knew about it was that the tractor was to be down there to do some work and you were to follow the instructions of the person who leased it? [164]

(Testimony of Clarence Davis)

The Witness: Yes, sir.

The Court: And he gave you instructions to go to the airport and you went there?

The Witness: Yes, sir.

The Court: That is all.

Q. By Mr. Girling: Now, the first job you did with the tractor when you got down there, who gave you instructions to do it?

The Court: Aren't we getting away from the question that is facing us? It is one thing to instruct a man to do certain work but it is another thing as to the method of the operation of the equipment. The fact this tractor was on the airport was not wrong in itself, was it?

Mr. Girling: That is not the purpose of my question, your Honor.

The Court: I am asking you for a general picture. We have been taking testimony as to how the tractor got to the airport, but the fact that the tractor was there was not in itself manifestly wrong, was it?

Mr. Girling: That has nothing to do with the question I intended to ask.

The Court: I am simply asking counsel a question. It was the operation of the tractor at the time of the accident that was wrong?

Mr. Brewer: We also have a defense which was set up, and [165] that is that it was operated at a place and time against our consent and against our instructions and without our knowledge.

Mr. Girling: Yes.

Mr. Brewer: That is one of Mr. Finch's defenses which I put in evidence to prove—



(Testimony of Clarence Davis)

Mr. Girling: I want to go further in view of the California law. I would like to make an offer of proof while this witness is on the stand, that although he and the tractor and the gasoline and oil were already rented as a unit, nevertheless the lessee of that unit at all times gave him instructions of what he was to do and not the owners, Radich & Brown, and I would like to trace it as to every job he did from the time he lit down there on the 22nd or 23rd of April up to the time of the accident, to show that Radich & Brown never did give him instructions, but that he took his instructions from the lessee or the lessee's agent.

The Court: That is the point that I am raising. According to this witness' testimony he was sent down there with the equipment and the equipment operated by himself. As a matter of fact the equipment and the driver was leased to Mr. Finch on whatever basis he testified to here, and he was told to report to Mr. Finch with the equipment. He goes down there and he sees Mr. Finch. Mr. Finch says that Mr. Otto Davis will give him his instructions as to the work [166] The only one thing that could mean was to instruct him as to the nature of the work that he was to do.

Mr. Girling: Not necessarily. That is why I wanted to lead up to my questions, because I don't think that is absolutely correct. If your Honor will bear with me for just a second I will be through.

The Court: We will take a 15-minute recess at this time.

(Short recess.)

The Court: Proceed, gentlemen.

(Testimony of Clarence Davis)

Mr. Lillie: If the court please, during the recess we tried to reach a settlement but the offer made was not acceptable to the Government.

The Court: All right, proceed.

Q. By Mr. Girling: Mr. Davis, let us take this job over at Palm City, or wherever it was, where there were date trees and grapefruit trees, I believe.

A. Yes, sir.

Q. Who directed you to go to that job?

A. Otto Davis met me there and that is where we unloaded the tractor and started to work the next day.

Q. That was after you had talked with Mr. Finch and Mr. Finch had told you that Davis would give you directions?

A. That is right.

Q. And what directions, if any, did Otto Davis give you there as to what you were to do at that job? [167]

A. He told me which acreage I was to start on and what trees to take out; how many acres to work and that I was to take the grapefruit trees from between the date palm trees.

Q. By the way, when those trees, the grapefruit trees between the palms, was there any dirt that had to be filled in there at all?

A. No, sir, I didn't do that.

The Court: Were there any grapefruit on the trees?

The Witness: Yes, sir.

Q. By Mr. Girling: Radich & Brown did not direct you, nor either of them, about going to that particular job or taking out any grapefruit trees or anything, did they?

A. No, sir, they did not.

Q. Do you recall some jobs that Otto Davis directed you to where there had to be some dirt filled in?

A. Yes, sir.

(Testimony of Clarence Davis)

Q. Do you recall at any time on any of those jobs Otto Davis or any of his men putting up any stakes or telling you by word of mouth or otherwise how much fill you were to make in those instances?

A. When they put up the stakes they marked the stakes and told me to fill to that grade.

Q. Did Radich & Brown or either of them at any time direct you as to how much fill you were to put in or direct you on any of those particular jobs? [168]

A. No, sir.

Q. And when you went to the airport who directed you to go over to the airport?      A. Otto Davis.

Q. When you got to the airport you were directed to cross over the strip on the planks? Who directed you to go over the strip on the planks?

A. Goodine told me then.

Q. That is the foreman for Wilcox?

A. I took orders from him.

Q. And who told you you were to take orders from him?

A. Mr. Davis told me that he was turning me over to Hank when I pulled in there that evening.

Q. Otto Davis?      A. Yes, sir.

Q. Did either Mr. Radich or Mr. Brown direct you to proceed to the airport?      A. They did not.

Q. Did either Mr. Radich or Mr. Brown direct you to take any orders from Hank?      A. No, sir.

Q. And these stakes that were set up in a row where the ditch-digging trencher—where the water pipes were

(Testimony of Clarence Davis)

to be laid, the mains, do you know who put those stakes there in line that you were to knock down? [169]

A. Well, it was the resident engineer who put the stakes in there for the main to put the water pipeline through.

Q. And in operating the bulldozer did you follow a line of stakes as they stood up in line?

A. To the side of them, yes, sir.

Q. And who directed you to do that? Either Mr. Radich or Mr. Brown?

A. No, sir.

Q. Who did? A. That man out there.

Q. Mr. Cox? A. Yes.

Q. That is the foreman for Mr. Roeder?

A. Yes, sir.

Q. And the men you say who signaled you to go ahead and stop and what not, were they men working for Radich & Brown?

A. No, sir.

Q. Who did they take orders from, if anyone?

A. Apparently Mr. Cox.

Q. The foreman for Mr. Roeder? A. Yes, sir.

Q. From the time you left with this equipment on the 21st or 22nd of April, 1944, leave the yard or place of busi- [170] ness of Radich & Brown, did you receive any further orders as to how to operate this equipment?

A. No, sir.

Q. What to do with the equipment from Radich & Brown?

A. None whatever.

Q. From whom did you receive orders or directions?

A. From Mr. Davis and while at the airport Mr. Cox and while I was on the pipeline from Hank on the hangar.

Mr. Girling: That is all.

(Testimony of Clarence Davis)

Cross-Examination.

By Mr. Lillie:

Q. Mr. Davis, Mr. Girling asked you who told you how to operate this machine—how it was to be operated?

A. No one told me how to operate it.

Q. Nobody told you how to operate that machine, did they?

A. No, sir. He asked me who told me what to do with the machine—not how to operate it, as I understand it.

Q. What was to be done—strike that. Just told you what was to be done?

A. That is right.

Q. The work to be done. Nothing was said to you as to operating the machine at any time?

A. No, sir.

Q. Do you know Mr. Stover? [171]

A. No, I don't.

Q. You saw Mr. Stover when he testified on the stand, did you not?

A. Mr. Stover, you say?

Q. Yes.      A. Yes, I know him.

Q. Do you recall the day of the accident that you had a conversation with him that evening?

A. Yes, sir.

Q. Where did that occur?

A. At the restaurant in Indio.

Q. Who was present?

A. Mr. Stover and Ted sitting there beside him.

Q. Did you tell them about the accident at that time?

A. At the time of the accident, yes, I did. Not the day that I moved in there.



(Testimony of Clarence Davis)

Q. That was on the 2nd, the day of the accident?

A. Yes, sir.

Q. Now, how long prior to that had you been on that job?

A. I moved in the day before the evening—

Q. That would be the 1st?

A. In the evening, as I remember it.

Q. Did you eat dinner at that same restaurant?

A. Yes, sir. [172]

Q. Did you see Mr. Stover there that night?

A. I did.

Q. On the night of the 1st prior to the accident?

A. I did.

Q. Did you tell him that you had moved the machine to a new job at that time? A. I did.

Q. You had told him the night of May 1st, prior to the accident, that you had moved the machine onto the Palm Springs airport? A. I did.

Mr. Lillie: That is all, sir.

The Court: Did the foreman ask you where you were working? How did the conversation come up when you told him where you were? You heard his testimony on the witness stand when he said he did not know where the equipment was until he spoke to you.

The Witness: He knew that we had moved from Palm Village, but not exactly where, apparently, and he asked me where I had moved.

The Court: Asked you where you had moved the equipment?

The Witness: Yes, sir. And I told him.

(Testimony of Clarence Davis)

Redirect Examination.

By Mr. Brewer:

Q. You say that you are positive that you talked to Mr. [173] Stover on the evening of the 1st—that is the day before the accident?

A. Yes, sir, that is right.

Q. And in the restaurant Mr. Walker was present?

A. That is right.

Q. And anybody else?

A. No, no one that I know of.

Q. You told him at that time that you had moved on the airport at Palm Springs?      A. I did.

Q. And did he say anything to you about it?

A. Well, he asked me under whose orders and I told him.

Q. Did he say anything else to you about it?

A. Not that I recall.

Q. Now, Mr. Davis, do you recall any time on or about the 24th of April—that would be only a few days before the time you have just spoken about—do you recall a time when Mr. Radich and Mr. Brown and Mr. Ferguson and Mr. Finch came down there and discussed the operation of this particular piece of equipment with Mr. Davis in your presence and Mr. Stover's presence?

A. I don't recall whether it was before or after, but I do recall the conversation.

Q. Do you recall whether those gentlemen were there?  
[174]      A. Yes, sir.

Q. They came all the way down there?

A. Yes, sir.

(Testimony of Clarence Davis)

Q. And isn't it a fact that at that meeting Mr. Ferguson told you not to move that equipment on any job without the order from Mr. Finch or Mr. Stover?

A. I guess it was?

Q. Sir? A. I believe so.

The Court: Was that before or after the accident?

The Witness: I don't recall whether it was before or after.

Q. By Mr. Brewer: At any rate, that was the time Mr. Radich and Mr. Brown were there and Mr. Stover was there and Mr. Finch was there, isn't that correct?

A. They were there, yes, sir.

Q. And Mr. Otto Davis and Mr. Myers were there?

A. That is right.

Q. Sir? A. They were all there, yes, sir.

Q. And isn't it a fact that Mr. Finch also told you on that occasion you must not move that piece of equipment except upon his consent or Mr. Stover's consent to another job?

A. Yes, sir.

The Court: Your answer is yes? [175]

The Witness: Yes.

Q. By Mr. Brewer: And you knew that Mr. Myers and Mr. Davis were partners, didn't you?

A. Yes.

Q. And you knew that they were the ones that went out and got these jobs?

A. I did.

Q. Figured them, and so forth, and run them?

A. Yes.

Q. Is that correct? A. That is right.

Q. They did the surveying, and so forth?

A. Yes, sir.

The Court: That is all.

(Testimony of Clarence Davis)

Q. By Mr. Fraser: Mr. Davis, were you present when Mr. Goodine and Mr. Roeder or Mr. Cox had a conversation on the morning of May 2nd about the use of that equipment?      A. No, sir.

Q. You were not present?

A. I was on the tractor at work at that time.

Q. You were working at the time?

A. Doing some work for Mr. Wilcox.

Q. Working for Wilcox?      A. Yes, sir.

Q. And then how did you know to go over to the Roeder [176] job?      A. Through Hank Goodine.

Q. That was the superintendent for Mr. Wilcox?

A. Yes, sir.

Q. And what did he tell you at that time?

A. He told me they were going to loan the dozer to them to level that ground.

Q. Going to loan the dozer?

A. That is what I understood.

Q. Did he tell you what to do?

A. He told me to go over there and they would tell me what to do.

Q. Now, then, after you crossed the strip that had been planked you started forward, did you, from the planks with your bulldozer?

A. Yes. I was on the other side of the planks.

Q. And who was there at the time?

A. I don't recall. They told me where to go and I don't recall there was anyone there at that time.

Q. You don't recall that there was anyone there when you started to make the first cut?      A. No, sir.

(Testimony of Clarence Davis)

Q. There was no one stood at the end of the strip and waved you and told you to go this way or that way, was there?

A. Not at that time. That was on the other side of [177] the plane.

Q. And you don't know where Mr. Cox was at that time?

A. No, sir.

Q. And you did not see Mr. Roeder there at that time?

A. No, sir.

Q. Then after you finished making the long trip, as you might say, then you came around to the other side of the plane?

A. That is right.

Q. Where was Mr. Cox then? Did you see him then?

A. Mr. Cox?

Q. Yes.

A. I think he was up there where I started on the other strip, as I remember.

Q. You are certain of that?

A. He was there, if I remember rightly, trying to—planking the trenching machine across.

Q. And you did not see Mr. Roeder or anyone else there?

A. There was some laborers there.

Q. You didn't know any of them?

A. No, I didn't.

Q. Now, then, did you see Mr. Cox up at the other end, or anyone directing you from the other end in the direction in which you were going? [178]

A. No, not until I came to the little pipeline across, which I had to go around, and then pull up to it and back up toward the plane, then there were men down there to direct me.

Q. You stated that Mr. Cox was waving and signaling to you?

A. I did.



(Testimony of Clarence Davis)

Q. Before the accident?                      A. Yes, sir.

Q. You saw him before the accident signal to you?

A. Yes, sir.

Q. What did you think that he was—or what signal did you think he was giving you?

A. I wouldn't know.

Q. He was waving his hands, is that it?

A. Yes, sir.

Q. Did that mean anything to you?

A. Didn't mean anything to me.

Q. And where were you when he was doing that signaling? Where was the equipment?

A. It was between this little pipeline and the airplane.

Q. How far would that be from the airplane?

The Court: As it developed it was too close?

The Witness: It was too close, that is right.

Q. By Mr. Fraser: Now, isn't it a fact that you gave a [179] sworn statement to Captain Dunn on May 3rd, the day after the accident, in which you said—

Mr. Girling: One moment. The statement would be the best evidence of what he said. I haven't seen it.

The Court: It is in evidence.

Mr. Fraser: Yes, this is in evidence. This is the one we stipulated to this morning.

Mr. Girling: Very well, then, I have seen it.

Mr. Fraser: Quoting: "I had graded the west portion of this strip forward and was in the process of back-dragging from the corner of the line to the plane when the accident occurred. I was backing up in an alignment with my stakes. I was observing the pavement in order not to cut into it with the tread of the tractor. I was

(Testimony of Clarence Davis)

looking over my left shoulder at the ground immediately back of the tractor when I heard overhead the crash of the top and rear portion of the left wing of the aforementioned aircraft. I immediately pushed the hand clutch out in order to stop further backing of the machine. I did not see Mr. Cox until after the crash as he was on my right and I was looking over my left shoulder. He told me he was shouting at me and waving his arms at me, but I did not see or hear him because my attention was directed to the left side of the machinery and I could not hear him because of the noise of the machinery while in motion." Is that true? [180]

A. There were men on both sides so I would not say it was Mr. Cox or not, but whether I saw Mr. Cox on my left *of* not, but there was men on both sides of the tractor at the time.

The Court: But the statement given at the time was probably more representative of the truth of the facts than at this time?

The Witness: That is right. I do not remember which men were there at the present time.

Q. By Mr. Fraser: Did Mr. Roeder or Mr. Cox direct you as to how to use your machine; how deep to dig?

A. No, they didn't tell me how deep they had to dig. They wanted it level so they could put the trenching machine on there and dig the ditch to the right depth.

Mr. Fraser: That is all.

The Court: Any further questions?

Mr. Hart: Just one question.

(Testimony of Clarence Davis)

Q. By Mr. Hart: Do you have any special license for the operation of a bulldozer?

A. No, I don't carry a license.

Q. No license required?

A. Nothing only in the city.

Q. Now it is a fact, isn't it, that you were not permitted to allow anyone else to operate that bulldozer while it was in your custody? [181]

A. No. If I had not been satisfactory on the job they had the right to send me home and they could put someone else on.

The Court: You would not have left until another operator appeared, would you?

The Witness: No, sir, I would not; not as long as I was sent out there. I might not have operated it.

The Court: But you would not have walked away and left the equipment without another operator being present?

The Witness: That is right.

Q. By Mr. Hart: Does it require a special knowledge and skill to operate that bulldozer?

A. It does, and practice and all.

Q. Not every person can operate one?

A. No, that is right.

Mr. Hart: That is all.

Mr. Brewer: May I ask one question, Mr. Davis? This had the carryall on it at the time, didn't it?

A. No, it did not.

Mr. Brewer: That is all.

The Court: Witness excused.

Mr. Girling: Mr. Ferguson, will you take the stand again? [182]

EDWIN FERGUSON,

recalled as a witness on behalf of the Government, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

By Mr. Girling:

Q. Mr. Ferguson, do you have with you the records that the court asked you to bring? A. I do.

Q. This afternoon? A. Yes, sir.

Q. Did you have them here at 1:30?

A. Yes, sir.

The Court: I am satisfied he did because he was here in court.

Q. By Mr. Girling: Now, Mr. Ferguson, do the records indicate and will you find them—I have never seen them as far as you know? A. No, sir, you haven't.

Q. Do they indicate when you first received any information that their bulldozer was over at the Army airport?

A. The records do not indicate when I received the information, no.

Q. When was a record received at your office indicating the bulldozer was at the air field—not necessarily the [183] the date of the record?

A. We get them anytime from Monday afternoon until Wednesday morning. This work we started on May 1st, I believe it was, and that was a Monday and this happened on Tuesday. He continued his week's work as usual and anytime from Saturday night until Monday all operators would put their tickets and their time cards in an envelope and mail them in to the office. If they were not working in town they would do that. We would get them, say for sake of argument, an average of Tuesday, which would

(Testimony of Edwin Ferguson)

make it about the 9th of the month. The work was completed on the 10th. The records indicate the work on the first farm leveling and on the second, showing it going to Palm Springs air base and leaving the air base about the 10th.

Q. Well, now, then, the first knowledge you would have would be when you received the record showing he was going to the air base, is that correct?

A. No. I got the information from someone by telephone a couple of days, two or three days, after this happened.

Q. That is, of the accident?

A. Yes. I don't recall who telephoned me.

The Court: As I understand it, then, your records indicate that Clarence Davis sent in a report to you after May 1st. [184]

A. May 1st was on a Monday, so he keeps his records until Saturday night.

The Court: Sometime after Saturday night the records were mailed to you?

The Witness: That is correct, either bring them or mail them in.

Q. By Mr. Girling: That would be six or seven days after the accident before you would ever get the record?

A. Well, the accident was on a Tuesday, the 2nd, and we would have gotten it about Monday or Tuesday of the following week, which would be the 8th or 9th.

Q. Seven days, then?

A. Yes, sir. Some come in Monday and some Tuesday and Wednesday.



(Testimony of Edwin Ferguson)

Q. So before Radich and Brown had a record of this equipment ever being at the airport you had heard of the accident independently of the record?

A. That is correct.

The Court: What did you do when you heard it was at the air base?

The Witness: Nothing I could do except attempt to get hold of our man, get our man and warn him about moving the equipment from one place to another. There is nothing I could except wait. Mr. Finch was out of town.

The Court: You heard the testimony of Mr. Davis regard- [185] ing a general conference down there attended by Mr. Radich and Mr. Brown and Otto Davis and Clarence Davis and Mr. Finch—the conference in which everybody joined in?

The Witness: I do not remember that many, your Honor. I know I had a telephone call—two or three telephone calls from Mr. Finch about the equipment being moved around and he asked me to come down and I asked Mr. Radich to go so he would be acquainted. He had not been down in the vicinity and we picked up Mr. Finch on our way down in San Bernardino and went down to the job where they were working. They were brushing a farm tract of land down below Palm Village, so I believe it was about eight miles north of Indio we talked with Davis.

The Court: Which Davis?

The Witness: Clarence Davis, the operator. I recall they were having a little trouble with a water hose or radiator hose and during the general conversation we

(Testimony of Edwin Ferguson)

again cautioned him about moving the equipment from one place to another without Mr. Finch's instructions. I do not recall the other Davis being there.

Mr. Brewer: What was the date of that?

The Court: Before or after the accident?

The Witness: Before—the 24th or 25th or 26th. I do not recall. The 24th or 25th or 26th of April. In other words; just a few days after it went down on the— [186]

The Court: The 21st I think it started and went to work on the 22nd.

The Witness: It was about two or three days after it went to work.

Q. By Mr. Brewer: Was Mr. Finch there?

A. Yes. We picked him up at San Bernardino and brought him back to San Bernardino.

The Court: Did you meet Otto Davis there at that time?

The Witness: No, I don't recall Otto Davis being there.

The Court: Clarence Davis continued to act as your operator and proceeded with the work that Mr. Finch wanted him to do?

The Witness: That is correct.

Mr. Girling: And Finch kept paying you for the use of the equipment?

The Witness: That is correct.

Mr. Girling: No one else paid you for it?

The Witness: No.

Q. By Mr. Girling: You had no knowledge of \$30 being paid by Wilcox to Roeder?

(Testimony of Edwin Ferguson)

The Witness: Not until I heard about the invoice this morning. I heard of it later after the accident, that they were working on the Wilcox job.

Q. You had no idea that the equipment had gone over to work for Wilcox? [187]      A. None whatsoever.

Mr. Girling: I do not know at what counsel's request the records were brought, but if there are any of you gentlemen who want to see them you are welcome to do so.

Mr. Lillie: It was at the court's request.

The Court: The court was interested in knowing whether the records disclosed certain facts. The records coupled with the witness' testimony has now furnished the court with the information that it desired.

Mr. Brewer: Might I ask a question or two?

Q. By Mr. Brewer: Did I understand you—I didn't quite hear Mr. Ferguson's testimony. Your records indicate that this was used on May 1st for leveling land, agricultural land?      A. Correct.

Q. And the first day of its working on the airport was May 2nd?      A. That is correct.

Q. Now, does May 1st show a full day's use?

A. We paid the operator for 11½ hours and charged Finch 11½ hours. It shows 2½ hours working on Palm Village land leveling and 9 hours moving time.

Q. All right. I did not hear exactly what you said about instructions to Mr. Clarence Davis, the operator on the 24th or 25th of April. What did you say to him about that, [188] about moving the equipment?

A. Merely to instruct him not to move equipment to various jobs without authority from Mr. Finch because

(Testimony of Edwin Ferguson)

Mr. Finch had called me on two or three occasions complaining about it. That was the reason we made the trip down. We rarely *to* out unless we go out to make sure our customer is satisfied—not to look after the operators.

The Court: In other words, you knew that Finch was using this equipment and that somebody else was also using it under Fitch's agreement with you?

A. Yes. We had knowledge that Otto Davis—Davis & Myers, or whatever the name is, were obtaining contracts and doing work and, if I am not out of order, Finch was the middle-man for financing and getting what he could out of it.

The Court: Had Davis & Myers ever contacted you directly to rent equipment prior to this accident?

The Witness: Just a little further back, your Honor. This had been going on for some two or three months—maybe three months, I guess, without going to the records, on various other sections, with two or three pieces of equipment in the neighborhood or vicinity of Indio. We had had one or two telephone calls between Myers, Otto Davis and Myers and myself. Most of our conversations were with Myers wanting equipment. Mr. Davis—I am not sure whether both of them—one of them was in the office, our Burbank office, one day [189] while I was away on another trip and I did not see them. He left word that he wanted some equipment but I left the instructions at the office that all contacts would be between us and Gallen Finch. If I am not of order I would like to



(Testimony of Edwin Ferguson)

clarify the point you asked about the rental. We used the maximum monthly rental on the equipment and when it comes down to a weekly, daily or hourly rate that rate increases, so the man using an hourly or weekly rate is not out of order, so that is no gouging there, I might say.

The Court: You rented it out on a monthly basis and the man that rents it out for a day or two or a week at a time is able to charge a higher price and thereby raise the margin?

The Witness: That is right. The weekly rate is one-fourth higher.

The Court: One-fourth higher than the monthly rate?

The Witness: You take the weekly rate and you revert to four days. Anything over four days is profit. It is the OPA setup.

Mr. Girling: I would like to finish my examination.

Q. By Mr. Girling: Mr. Ferguson, at any time when Clarence Davis was operating this equipment, let us say over in this grove where there was citrus and dates and he was bulldozing out the citrus trees, did you give him, or anyone from Radich & Brown, give him any directions or control him as to the manner and form as to how he was to bulldoze out [190] those citrus trees?

A. None at all.

Q. And when Mr. Davis was down there with this equipment, and I mean in this vicinity where it was used, did you or anyone from Radich & Brown give him any



(Testimony of Edwin Ferguson)

directions how little or *now* much dirt he should force into a back-fill or otherwise grade with the equipment?

A. Certainly not; no.

Mr. Girling: That is all.

The Court: Any further questions? If not, the witness is excused. Do you have any further witnesses?

Mr. Girling: No further witnesses on behalf of the defendant Radich & Brown.

Mr. Brewer: If that is all the evidence, your Honor, I would like to call Mr. Stover in rebuttal.

JOE STOVER,

called as a witness on behalf of Defendant Finch, having been previously duly sworn, testified in rebuttal as follows:

Direct Examination

By Mr. Brewer:

Q. Mr. Stover, you have heard the testimony of Mr. Davis that he told you, Clarence Davis, the operator of the tractor, that he told you the night before the accident the tractor had been moved to Palm Village when you were in the restaurant in Indio, I believe it was— [191]

The Court: No, the airport.

Mr. Brewer: Yes, the airport, that is true.

Q. By Mr. Brewer: Is that correct, sir?

A. I don't think it quite is. The first night he moved the tractor I had no idea it was there at the airport yet at that time.

(Testimony of Joe Stover)

Q. Where were you that night?

A. I came from San Bernardino to get the pay checks for two other boys we had there.

Q. When you first heard it was moved to the airport were you also informed at the same time the accident had happened?

A. Yes, sir.

Q. So it would not be correct to say that you knew the day before that it had been moved to the airport?

A. No, I did not know it was moved. It was the second day. The first day he worked at the airport I did not know about it. I did not know about it until the second day.

Q. And that was the evening of that day?

A. Yes.

Q. When you saw him in the restaurant?

A. Yes, sir.

Q. Did you eat in the restaurant on the evening of the day before the accident?

A. No. [192]

Mr. Brewer: That is all.

The Court: Witness excused. Any further witnesses?

Mr. Brewer: No further witnesses, your Honor.

The Court: Gentlemen, I think I will set Monday afternoon at 2:30 as the time for argument in this case.

(Whereupon, at 4:15 o'clock p. m., the hearing in the above-entitled matter was continued until 2:30 o'clock p. m., Monday, November 26, 1945.)

[Endorsed] Filed Mar. 18, 1946. [193]

[Endorsed]: No. 11288. United States Circuit Court of Appeals for the Ninth Circuit. Mike Radich and C. T. Brown, doing business under the fictitious firm name of Radich & Brown and Clarence A. Davies, Appellants, vs. United States of America, C. B. Stratton, doing business under the name of Stratton Construction Company, Walter S. Roeder, Jack Wilcox, Galen B. Finch, Otto Davis and Melvin Myers, Appellees. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed March 29, 1946.

PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals for  
the Ninth Circuit.

United States Circuit Court of Appeals  
for the Ninth Circuit

No. 11288

C. B. STRATTON, doing business under the name  
of STRATTON CONSTRUCTION COMPANY,  
Plaintiff,

vs.

UNITED STATES OF AMERICA,  
Defendant.

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UNITED STATES OF AMERICA,  
Defendant and Cross-Complainant,

vs.

C. B. STRATTON, doing business under the name  
of STRATTON CONSTRUCTION COMPANY;  
MIKE RADISH and C. T. BROWN, doing business  
under the fictitious name of RADISH & BROWN;  
JACK WILCOX, WALTER S. ROEDER, GAL-  
LEN B. FINCH, CLARENCE A. DAVIES, OTTO  
DAVIS and MELVIN MYERS,  
Plaintiff and Cross-Defendants.

STATEMENT OF POINTS UPON WHICH AP-  
PELLANTS INTEND TO RELY IN THE AP-  
PEAL OF THIS CASE

I.

That the evidence is insufficient to sustain the findings  
of fact of the trial court.

II.

That the findings of fact do not support the conclusions of law or judgment in said case.

III.

That the judgment is contrary to law.

Dated: this 3rd day of April, 1946.

GEORGE H. MOORE and  
HUGH B. ROTCHFORD and  
JEAN WUNDERLICH

By Jean Wunderlich

Attorneys for Appellants, Mike Radich and C. T. Brown,  
doing business under the fictitious name of Radich  
& Brown

[Proof of Service.]

[Endorsed]: Filed Apr. 5, 1946. Paul P. O'Brien,